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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 346

UNION BANK & TRUST COMPANY, PETITIONER,

vs.

R. C. PHELPS, INDIVIDUALLY AND AS TAX COLLECTOR OF MONTGOMERY COUNTY, ALABAMA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALABAMA

PETITION FOR CERTIORARI FILED SEPTEMBER 6, 1932

CERTIORARI GRANTED OCTOBER 17, 1932

(37,043)

( )

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[fol. 1]

IN CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

UNION BANK & TRUST COMPANY, Plaintiff,

versus

R. C. PHELPS, Individually, and as Tax Collector of Montgomery County, Alabama, Defendant

COMPLAINT—Filed March 7, 1932

Count One

The plaintiff, Union Bank & Trust Company, claims of the defendant, R. C. Phelps, individually, and as Tax Collector of Montgomery County, Alabama, the sum of $2,521.69 Dollars and alleges:

(1) Plaintiff is a state banking corporation organized and existing under the laws of the State of Alabama with its principal and only place of business in the City of Montgomery, Alabama, and is and, at the times herein mentioned, was engaged in a general commercial and savings bank business in the conduct of which plaintiff receives and accepts deposits from persons, firms, associations and corporations and makes loans to persons, firms, associations and corporations with real estate and personal property as security and without security, and purchases and deals in real estate mortgages and notes and purchases and deals in bonds, notes and other securities and obligations of the United States, of Alabama and other states, of municipalities and other governmental subdivisions and of private corporations and others;

(2) That heretofore on the 23 day of July, 1931, taxes amounting to $2,484.70 Dollars were assessed by the tax officials of Montgomery County, Alabama, against the plaintiff on the shares of its capital stock for the tax year beginning October 1, 1930, and ending September 30, 1931, the value of said shares of capital stock as entered for assessment being $124,235.00 Dollars; and that in arriving at the assessed value of such shares the sum at which the

real estate and the improvements thereon and the furniture and fixtures belonging to the plaintiff were returned and assessed for taxation for said tax year was deducted from the aggregate value of said shares; that the said assess-
[fol. 2] ment of the shares of capital stock of the plaintiff was made and so entered under the provisions of Section 6 of an Act adopted by the Legislature of Alabama of 1923, approved August 22, 1923, (Laws of Alabama of 1923, page 152, at pages 161, 162);

(3) That there are located in the City of Montgomery, Alabama, and in the County of Montgomery, Alabama, and elsewhere in this State, building and loan associations, mortgage companies or corporations, companies or corporations making loans on real estate or purchasing mortgages or mortgage notes on real estate, industrial loan companies or corporations, and insurance companies or corporations and other private corporations, associations and individuals who were, during the years 1930, 1931 and 1932, and who are now, engaged in the carrying on of their said businesses in actual and substantial competition with the business of national and state banks located in the City of Montgomery, Alabama, and elsewhere in this State and in competition with plaintiff bank by making loans, purchasing and dealing in real estate mortgages and notes, and purchasing and dealing in bonds, notes and other securities and obligations of the United States, of Alabama and other states, of municipalities and other governmental subdivisions and of private corporations and others, and thus and otherwise employing moneyed capital in such actual and substantial competition and not merely for personal investment;

(4) That during the years 1930, 1931 and 1932 there were and are now located in said City of Montgomery, Alabama, national banks engaged in the general commercial and savings bank business and receiving deposits from persons, firms, associations and corporations and making loans to persons, firms, associations or corporations with real estate and personal property as security and without security and purchasing and dealing in real estate mortgages and notes and purchasing and dealing in bonds and other obligations of this State and other States and of the United States and bonds, notes, and other securities and

obligations of said State and other states and of the United States and of municipalities and other governmental subdivisions and of private corporations and others; that said national banks were and are engaged in actual and substantial competition with plaintiff bank;

(5) That the State of Alabama has by statutes now and at the times herein mentioned in effect, or otherwise, left [fol. 3] untaxed or exempted from taxation, or has taxed at a lesser rate of taxation, shares of capital stock and/or property and/or moneyed capital of building and loan associations mortgage companies or corporations, companies or corporations making loans on real estate or purchasing mortgages or mortgage notes on real estate and industrial loan companies or corporations and insurance companies and the capital stock and/or property and/or moneyed capital of other private corporations, associations and individuals in actual and substantial competition with the business of national banks and state banks, including plaintiff;

(6) That the Attorney General of Alabama rendered an opinion to this defendant dated January 29, 1932, to the effect that shares of capital stock in national banks located in Montgomery, Alabama, the same city in which plaintiff is located and does business, can not be taxed under the provisions of Section 6 of the said Act adopted by the Legislature of Alabama in 1923 for the reason that said statute is void and ineffective insofar as it attempts to levy a tax on shares of capital stock of said national banks because said statute is violative of Section 5219 of the Revised Statutes of the United States, which contain the following provisions:

"The legislature of each State may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several States may (1) tax said shares, or (2) include dividends derived therefrom in the taxable income of an owner or holder thereof, or tax such associations on their net income or (4) according to or measured by their net income, provided the following conditions are complied with:

"1. (a) The imposition by any State of any one of the above four forms of taxation shall be in lieu of the others,

except as hereinafter provided in subdivision (c) of this cause.

"(b) In the case of a tax on said shares the tax imposed shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State coming into competition with the business of national banks: Provided, That bonds, notes, or other evidences of indebtedness in the hands of individual citizens not employed or *ne*gaged in the banking or investment business and representing merely personal investments not made in competition with such business, shall not be deemed moneyed capital within the meaning of this section."

A copy of said opinion of the Attorney General of Alabama is hereto attached, marked Exhibit "A", and made a part hereof; that this defendant and the other tax officials in said [fol. 4] County and said State are making no efforts and do not intend to collect and can not lawfully collect the tax attempted to be imposed under the provisions of Section 6 of said statute on shares of capital stock of the national banks located in the City of Montgomery, Alabama;

(7) That it has been judicially determined by the United States District Courts in this State that the shares of capital stock of national banks located in certain cities of this State, to-wit, Dothan, Alabama, Selma, Alabama, and Troy, Alabama, can not be legally taxed under Section 6 of said Act, approved August 22, 1923, for the reason that moneyed capital in the hands of citizens of Alabama within the meaning of Section 5219 of the Revised Statutes of the United States in substantial and actual competition with the business of national banks located in the said cities is taxed at a lesser rate of taxation than the tax levied under the provisions of Section 6 of said Act approved August 22, 1923, or left untaxed or exempted from such taxation;

(8) That the said statute under which the said assessment was made against the shares of capital stock of plaintiff is and was at the times herein mentioned unconstitutional and void and violates Section 217 of the Constitution of Alabama which provides that "property of private corporations, associations and individuals of this State shall forever be taxed at the same rate" in that (a) the State of Alabama has by other statutes now in effect left untaxed or ex-

pressly exempted from taxation or has taxed at a lesser rate of taxation shares of capital stock and/or property of building and loan associations, mortgage companies or corporations, companies or corporations making loans on real estate or purchasing mortgages, or mortgage notes on real estate, and industrial loan companies or corporations, insurance companies and the shares of capital stock and/or property and/or moneyed capital of private corporations, associations and individuals in this State and that the Legislature of Alabama, in enacting said statutes or in failing to tax the shares of stock and/or property and/or moneyed capital of such other private corporations and associations and individuals has unlawfully and illegally discriminated against the plaintiff and in favor of such other private corporations, associations, and individuals; (b) the State of Alabama has failed to levy any valid and legal tax on the shares of capital stock of national banks located in Mont- [fol. 5] gomery County and elsewhere in the State of Alabama, which shares of stock are the same species of property as are the shares of capital stock of plaintiff;

(9) That the said statute under which the said assessment was made against the shares of capital stock of plaintiff is unconstitutional and void and violates the provisions of the Fourteenth Amendment to the Constitution of the United States of America, viz: Section 1 thereof which provides as follows:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

in that (a) the State of Alabama has by other statutes now in effect left untaxed or expressly exempted from taxation or has taxed at a lesser rate of taxation shares of capital stock and/or property of building and loan associations, mortgage companies or corporations, companies or corporations making loans on real estate or purchasing mortgages, or mortgage notes on real estate, and industrial loan companies or corporations, insurance companies and the shares of capital stock and/or property and/or moneyed

capital of private corporations, associations and individuals in this State and that the Legislature of Alabama, in enacting said statutes or in failing to tax the shares of stock and/or property and/or moneyed capital of such other private corporations and associations and individuals has unlawfully and illegally discriminated against the plaintiff and in favor of such other private corporations, associations, and individuals; (b) the State of Alabama has failed to levy any valid and legal tax on the shares of capital stock of national banks located in Montgomery County and elsewhere in the State of Alabama, which shares of stock are the same species of property as are the shares of capital stock of plaintiff; (c) the State of Alabama has by the provisions of its laws for the assessment, levy and collection of such taxes on the shares of capital stock of this plaintiff and other banks located within the State provided no due process of law for the taking of the property of the owners of said shares to satisfy the claim for such taxes;

(10) That notwithstanding the unconstitutionality of [fol. 6] said statute and the invalidity of the said assessment against the plaintiff's said shares of capital stock, the defendant in his capacity as Tax Collector of Montgomery County, Alabama, and under color of his office has made demand for the payment of the taxes under said assessment and has threatened immediately to advertise and sell said shares of capital stock and take all other steps necessary for the collection of said alleged taxes as provided by the laws of Alabama. A true copy of said demand for the payment of said taxes made by the defendant on the plaintiff is hereto attached, marked Exhibit B, and made a part hereof; that the advertising and selling of said shares of capital stock of plaintiff would have worked irremediable and irreparable damage to plaintiff; that it had no other remedy save to pay the amount claimed by the defendant as taxes and to thereafter bring an action against this defendant to recover the amount of said payment so illegally enacted by the defendant from the plaintiff;

(11) That plaintiff, after said demand had been served on it for payment of said amount to the defendant, did, on to-wit, the 7th day of March, 1932, pay under duress to the

defendant the said sum of $2,521.69 Dollars claimed by him as taxes and interest due to be paid by plaintiff on its said shares of capital stock and that at the time of said payment the plaintiff protested in writing the payment of said amount, a copy of which protest is hereto attached, marked Exhibit C, and made a part hereof, and also gave notice to the defendant that it would enter suit against him to recover back the amount of said payment, together with the legal interest thereon and that said amount so paid by the plaintiff to the defendant is now in the hands of the defendant.

Count Two

The plaintiff, Union Bank & Trust Company, a banking corporation organized and existing under the laws of the State of Alabama and located in the City of Montgomery, Alabama, claims of the defendant, R. C. Phelps, individually, and as Tax Collector of Montgomery County, Alabama, the sum of $2,521.69 Dollars, together with interest thereon from the 7th day of March, 1932, for that, the tax officials of Montgomery County, Alabama, acting under and as authorized by Section 6 of an Act adopted by the Legislature of Alabama of 1923 and approved August 22, 1923, (Laws of Alabama of 1923, pages 161, 162 did heretofore assess the shares of plaintiff for taxation for the tax year [fol. 7] beginning October 1, 1930, and ending September 30, 1931, at the assessed value of $124,235.00 Dollars; that the taxes upon said property as so assessed amounted to the sum of $2,484.70 Dollars; that said taxes became due and payable on the 1st day of October, 1931; that thereafter the defendant, in his capacity as Tax Collector of Montgomery County, Alabama, and under color of his office, made demand upon plaintiff for the payment of said taxes as so assessed, and did threaten to immediately advertise and sell said shares and take any and all other steps authorized by the laws of the State of Alabama that he might deem necessary to collect said taxes, a copy of said demand being hereto attached, marked Exhibit B, and made a part hereof; that the plaintiff, as a result of said demand and threats and by reason of duress, did pay under protest to the defendant, as such Tax Collector, the said amount of taxes so demanded of it, to-wit, $2,521.69 Dollars, on the 7th day of March, 1932, a copy of said protest being

hereto attached, marked Exhibit C, and made a part hereof; that at the time of said payment the plaintiff did notify the defendant that it would enter suit against him to recover back the said amount so paid, together with legal interest thereon, and that said amount so paid to the defendant is now in the hands of the defendant as such Tax Collector.

That Section 5219 of the Revised Statutes of the United States, which authorizes states to tax the shares of national banking associations, provides, among other things, as follows:

"The legislature of each State may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several States may (1) tax said shares, or (2) include dividends derived therefrom in the taxable income of an owner or holder thereof, or (3) tax such associations on their net income, or (4) according to or measured by their net income, provided the following conditions are complied with:

"1. (a) The imposition by any State of any one of the above four forms of taxation shall be in lieu of the others, except as hereinafter provided in subdivision (c) of this clause.

"(b) In the case of a tax on said shares the tax imposed shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State coming into competition with the business of national banks: Provided, That bonds, notes, or other evidences of indebtedness in the hands of individual citizens not employed or engaged in the banking or investment business and representing merely personal investments not made in competition with such business, shall not be deemed moneyed capital within the meaning of this section."

[fol. 8] Plaintiff further alleges that it was doing a general banking business in Montgomery County, Alabama, during the said year beginning October 1, 1930, and ending September 30, 1931, and employed moneyed capital in connection therewith; that during said time there were national banking associations doing business in Montgomery County,

Alabama, and elsewhere in Alabama; that during said time there were individuals, corporations and associations doing business in Montgomery County and elsewhere in Alabama which employed moneyed capital not merely for personal investment coming into competition with the business of national banking associations and coming into competition with the business of plaintiff, and that under the laws of Alabama in force and effect during said time the shares and/or moneyed capital of said individuals, corporations and associations were not taxed or were taxed at a lesser rate than the tax imposed by said laws upon the shares of national banking associations or upon the shares and/or the moneyed capital of the plaintiff.

Plaintiff further avers that the said shares of plaintiff so taxed as aforesaid are property of the same class or species as the shares of national banking associations and as the shares and/or moneyed capital of the aforesaid individuals, corporations and associations so doing business during said time in Montgomery County and elsewhere in Alabama.

Plaintiff further avers that though the State of Alabama was authorized and permitted and had power under the statutes of the United States to impose a tax upon the shares of said national banking associations so doing business in Montgomery County and elsewhere in Alabama not at a greater rate than assessed upon other moneyed capital in the hands of individual citizens of Alabama coming into competition with the business of said national banking associations, nevertheless said Section 6 of said Act adopted by the Legislature of Alabama of 1923, under which the said tax was assessed and paid by plaintiff and which purports to impose a tax upon the shares of national banking associations, does not legally impose a tax upon the shares of said national banking associations.

Plaintiff further avers that the United States District Courts in this State have held and decreed in certain cases heretofore filed therein by national banking associations located in the Cities of Dothan, Selma and Troy, Alabama, [fol. 9] that said Section 6 of said Act adopted by the Legislature of Alabama of 1923 and approved August 22, 1923, does not legally impose a tax upon the shares of said national banking associations, and that the Attorney General of Alabama heretofore rendered an opinion to the defendant herein to the same effect in respect to national banking

associations located in the City of Montgomery, Alabama, and plaintiff further avers that by reason of the aforesaid decrees and opinion the defendant and other tax officials in said County and State have not collected and have made no effort to collect and do not intend to make any effort to collect any tax sought to be imposed by said Section of said Act upon the shares of national banking associations located in the City of Montgomery, Alabama.

Plaintiff further avers that said Section 6 of said Act adopted by the Legislature of Alabama of 1923 violates the Fourteenth Amendment to the Constitution of the United States and is unconstitutional and void.

Plaintiff further avers that said Section 6 of said Act violates the Fourteenth Amendment to the Constitution of the United States in that it imposes a tax on the shares of national banking associations at a greater rate than is assessed upon moneyed capital in the hands of individual citizens of Alabama coming into competition with the business of national banking associations; and is unconstitutional and void.

Plaintiff further avers that said Section 6 of said Act violates the Fourteenth Amendment to the Constitution of the United States in that it imposes a tax on the shares of plaintiff and fails to legally impose a tax upon the shares of national banking associations and is unconstitutional and void.

Plaintiff further avers that said Section 6 of said Act violates the Fourteenth Amendment to the Constitution of the United States in that it imposes a tax upon the shares of plaintiff and that under the laws of Alabama in force and effect during the aforesaid year beginning October 1st, 1930, and ending September 30th, 1931, the shares and/or moneyed capital of said individuals, corporations and associations doing business during said time in Montgomery County and elsewhere in Alabama were not taxed or were taxed at a lesser rate than the tax imposed by said Section 6 of said Act upon the shares of plaintiff and is unconstitu-
[fol. 10] tional and void.

Plaintiff further avers that said Section 6 violates Section 217 of the Constitution of Alabama and is unconstitutional and void.

Plaintiff further avers that said Section 6 violates Section 217 of the Constitution of Alabama and is unconstitutional and void in this:

(a) That the shares of private corporations, associations and individuals of Alabama are not taxed at the same rate thereunder.

(b) That under the laws of Alabama in force and effect during said year beginning October 1st, 1930, and ending September 30th, 1931, the moneyed capital of private corporations, associations and individuals of Alabama was not taxed or was taxed at a lesser rate than the moneyed capital of plaintiff.

(c) That under the laws of Alabama in force and effect during said year beginning October 1st, 1930, and ending September 30th, 1931, the shares of corporations and associations of Alabama were not taxed or were taxed at a lesser rate than the said shares of plaintiff.

(d) That under the laws of Alabama in force and effect during said year beginning October 1st, 1930, and ending September 30th, 1931, the shares of national banking associations doing business in Alabama were not legally taxed.

Plaintiff further avers that said Section 6 of said Act violates Section 211 of the Constitution of Alabama and is unconstitutional and void.

Plaintiff further avers that said Section 6 of said Act violates Section 211 of the Constitution of Alabama for the reasons and in the particulars set forth in subdivisions numbered (a) to (d) hereof, and is unconstitutional and void.

Count Three

The plaintiff claims of the defendant the sum of $2,521.69 Dollars due from him by account on the 7th day of March, 1932, which sum of money with interest thereon is still due and unpaid.

[fol. 11] Count Four

The plaintiff claims of the defendant the sum of $2,521.69 Dollars due from him for money on the 7th day of March, 1932, received by the defendant to the use of the plaintiff, which sum of money, together with interest thereon, is still due and unpaid. Hence this suit.

William B. White, John S. Coleman, Attorneys for Plaintiff. Bradley, Baldwin, All & White, of Counsel.

I, R. C. Phelps, the defendant in the above styled suit, do hereby accept service of a copy of the summons and complaint in said suit, this 7th day of March, 1932.

R. C. Phelps, Individually and as Tax Collector of Montgomery County, Alabama.

EXHIBIT "A" TO COMPLAINT

Jan. 29, 1932.

Hon. R. C. Phelps,
Tax Collector, Montgomery County,
Montgomery, Alabama:

Tax Collector of Montgomery County, under facts set out by him, is not required to collect tax on shares of capital stock of national banks in Montgomery, under the ruling of the Federal Court construing Section 5219 of the Revised Statutes of the United States as amended.

Tax Collector may legally accept the amount of State and County tax tendered on its physical property and is not required to collect the ad valorem assessment on its shares of capital stock.

Opinion by the Attorney General

MY DEAR SIR: I have you- letter of January 6th, 1932, in which you set out a certain state of facts which you say exists in respect to the national banks doing business in Montgomery, Alabama. The state of facts set out by you is as follows:

"(1) The State and County tax imposed on its shares is at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of the State coming in competition with its business as a National Bank;

"(2) The tax on its shares is in excess of what is assessed upon other moneyed capital in the hands of Building & Loan Associations, Industrial Banks, and domestic insurance cor- [fol. 12] porations of Alabama, located in and doing business in Montgomery, Alabama, all of which lend money here in Montgomery to the extent of hundreds of thousands of dollars, in competition with the business of this National Bank;

"(3) Building and Loan Associations, Industrial Loan Companies and Corporations, Industrial Banks, which engage in business in Montgomery, Alabama, and lend money in competition to The First National Bank of Montgomery to the extent of hundreds of thousands of dollars, are exempted from the assessment and payment of ad valorem taxes on its shares;

"(4) Mortgage Companies and corporations making loans on real estate in Montgomery, Alabama, and purchasing mortgages and mortgage notes on real estate in Montgomery, Alabama, to the extent of many thousands of dollars, in competition with the business conducted by The First National Bank of Montgomery, are exempted from this tax, which is applicable to the shares of stock of National Banks;

"(5) Insurance Companies organized under the laws of Alabama, and doing business in Montgomery, Alabama, and lending money on mortgages, and purchasing State and municipal bonds in competition with the business of The First National Bank of Montgomery, Alabama, to the extent of thousands of dollars, are given exemptions in ad valorem stock or share assessment and taxation not given to The First National Bank of Montgomery;

"(6) That in the conduct of its business as a National Bank, and in lending money, and purchasing notes, and bonds, and stocks, other individuals, persons and corporations engaged in like business, and in competition with said National Bank in Montgomery, Alabama, to the extent of thousands of dollars, are not assessed and taxed an ad valorem tax on such moneyed capital which comes into competition with the business of said National Bank;

"(7) A large amount of property of like character to that of the shares of stock of said National Bank, viz: money loaned, bills and notes discounted, securities bought and sold by a large number of persons, firms and corporations engaged in such a business to the extent of thousands of dollars, is not assessed for taxation, but is exempted."

You also state that you know from your experience as Tax Collector that some, if not all, of the foregoing alleged and asserted exemptions, and alleged discriminations, exist,

and that you believe these facts to be substantially true, and that these conditions exist in the taxing district in which the National Banks in Montgomery are located.

You inquire as follows:

"(1) Can I require The First National Bank of Montgomery to pay the State and County tax assessed against its share and capital stock?"

"(2) Can I legally accept the amount of the State and County tax heretofore tendered me by it on its ad valorem assessment on its real estate, and not collect the ad valorem assessment on its shares or capital stock?"

[fol. 13] I am of the opinion that the facts set out in your letter of January 6th bring the Montgomery National banks within the same category of the Selma National Bank and the National Bank at Dothan, and the First Farmers and Merchants National Bank of Troy. In the case of the banks outside of Montgomery before mentioned, the United States District Court held that such banks are not liable for the tax on its shares of capital stock. This ruling of the United States District Court is in harmony with repeated rulings of the Supreme Court of the United States:

Iowa-Des Moines National Bank vs. Bennett, decided by U. S. Supreme Court Dec. 14, 1931, 76 L. Ed. Advance Sheets, Vol. 4;

First National Bank vs. Anderson, 269 U. S. 341; 70 L. Ed. 295;

Public National Bank of New York vs. Keating, 47 F. (2d), 561; affirmed U. S. Sup. Court Dec. 1931, 76 L. Ed., —, Advance Sheets, Vol. 4;

First National Bank vs. Hartford, 273 U. S. 548; 71 L. Ed. 767;

Minnesota vs. First National Bank, 273 U. S. 561; 71 L. Ed. 774;

Boise National Bank vs. Ada County, 48 Fed. (2d) 222;

Commercial National Bank vs. Franklin County, 45 Fed. (2d) 213;

Roberts, etc., vs. American National Bank (Fla.) 121 So., 554.

In view of this situation I think it would be useless for you to contend for the tax assessed against the shares of capital stock of National Banks in Montgomery.

Yours truly, (Sgd.) Thos. E. Knight, Attorney General.

EXHIBIT "B" TO COMPLAINT

Montgomery, Alabama, March 7th, 1932.

To Union Bank & Trust Company, Montgomery, Alabama:

Take notice that I hereby make demand upon you for payment forthwith of $3,259.53 Dollars, with interest thereon from January 1st, 1932, state and county ad valorem taxes shown by the records in my office to be due by your Bank and delinquent since January 1st, 1932, on account of the real estate and tangible personal property of your Bank and the shares of your Bank's capital stock in accordance with the assessment thereof for the tax year October 1, 1930, to September 30, 1931.

If you do not pay this amount forthwith, I shall proceed at once to levy upon sufficient assets of your Bank in the manner prescribed by the laws of Alabama to satisfy, in my opinion, the amount of such ad valorem taxes past due by you and delinquent as aforesaid with respect to said real estate and tangible personal property, to give notice of sale thereof, and sell the same for the satisfaction and payment of that part of said taxes and interest and fees thereon applicable to said real estate and tangible personal property and to take the steps provided by the laws of Alabama to subject to levy and sale all of the shares of your Bank's capital stock to satisfy the amount of such taxes due on account of such shares and after taking such steps, I shall forthwith proceed to advertise for sale and sell said [fol. 14] shares of capital stock in the manner prescribed by the laws of Alabama for the satisfaction of said taxes and interest and fees thereon with respect to that part of such taxes applicable to said shares.

Unless payment is made forthwith in accordance with this demand, I will proceed as aforesaid at once.

R. C. Phelps, Tax Collector of Montgomery County, Alabama.

EXHIBIT "C" TO COMPLAINT

Montgomery, Alabama, March 7th, 1932.

To R. C. Phelps, Tax Collector of Montgomery County, Alabama:

DEAR SIR: Payment by the accompanying check for $737.84 Dollars, representing State of Alabama and County of Montgomery ad valorem taxes on the real estate and tangible personal property of the undersigned, plus interest thereon at the rate of eight per cent — annum from January 1st, 1932, is hereby made to you, admitting the liability of the undersigned for said amount of taxes.

Payment by the accompanying check for $2,521.69 Dollars, being the amount of State of Alabama and County of Montgomery ad valorem taxes, with interest thereon from January 1, 1932, assessed for the tax year beginning October 1, 1930, and ending September 30, 1931, against the undersigned under Section 6 of the General Acts of Alabama of 1923, page 152, with respect to the shares of the capital stock of the undersigned Bank is made pursuant to your notice and demand therefor dated March 7th, 1932, and is made with a denial of the validity of said assessment or any part thereof and with a denial of the right of the State of Alabama and the County of Montgomery or any other authority to make said assessment or any part thereof, and with a claim by the undersigned for the immediate refund of this payment on the ground that said taxes have been erroneously, illegally, invalidly and unconstitutionally assessed and Under protest in order to avoid the collection of said taxes and interest thereon by levy and sale of said shares of capital stock as threatened by you in your notice and demand.

The undersigned claims that said assessment of said shares of capital stock and the collection of said tax thereon by you are erroneous in toto and illegally made and wrongfully exacted and collected from the undersigned, and that if you proceed as threatened in your said notice and demand dated March 7th, 1932, the undersigned will undergo irremediable and irreparable injury both to its reputation as a banking institution and in other respects and its stockholders will undergo irremediable and irreparable injury in the sale of their said shares and in the injury to the reputation of the undersigned Bank.

Notice is hereby given you that the undersigned will forthwith commence an action at law against you for the recovery of the amount so herewith and hereby paid under protest.

The specific reasons for the protest of the undersigned hereby made are

(1) Under Section 5219 of the Revised Statutes of the United States, the shares of national banks located in the State of Alabama sought to be taxed by said Section 6 of the General Acts of Alabama of 1923, page 152, may not be taxed by reason of the fact that throughout the years 1930 and 1931 and the year 1932 to date, there were in the State of Alabama many hundreds of thousands of dollars of moneyed capital in the hands of citizens of Alabama, within the meaning of said Section 5219 of the Revised Statutes of the United States, in substantial and actual competition with the business of national banks located in [fol. 15] the State of Alabama but taxed at a lesser rate of taxation than that sought to be assessed and levied against the shares of national banks, or expressly untaxed or exempted wholly from taxation; that the same is true in the principal cities in Alabama, including the City of Montgomery, Alabama, in which the undersigned Bank is located and in which there are also located two national banks, and in the State of Alabama and in the City and County of Montgomery, Alabama, throughout said period there were in active operation mortgage companies, industrial loan companies, investment security dealers, building and loan associations, insurance companies and corporations and individuals engaged in financial businesses lending money on real and personal security and without security, dealing in investment securities and otherwise using moneyed capital in competition with the business of national banks and not merely for personal investment, which moneyed capital so used is, and was during said period, taxed at a lesser rate than the shares of national bank in the State of Alabama or the two national banks in the City and County of Montgomery, Alabama, or expressly untaxed or exempted wholly from taxation.

(2) In various district courts of the United States for districts within the State of Alabama, it has been decided

in duly adjudicated proceedings that the shares of certain national banks located within the State of Alabama could not be legally taxed for the tax year beginning October 1, 1930, and ending September 30, 1931, for the purposes of state, county or city ad valorem taxes under the laws of Alabama and that said laws violated said Section 5219 of the Revised Statutes of the United States. The time for appeal from said United States District Court decisions or from some of them has elapsed and no appeals have been taken therefrom.

(3) The Attorney General of the State of Alabama has rendered formal opinion in writing that the shares of the national banks located in the City and County of Montgomery, Alabama, could not, for the state tax year beginning October 1, 1930, and ending September 30, 1931, be legally taxed for state, county or city ad valorem taxation and that such taxes claimed thereon cannot be legally collected by reason of the violation by the laws of the State of Alabama of the provisions of Section 5219 of the Revised Statutes of the United States.

(4) Under the decisions of the Supreme Court of Alabama the shares of incorporated banks and banking associations incorporated under the laws of the State of Alabama and incorporated under the laws of the United States are the same species of property for ad valorem taxation.

(5) By reason of the foregoing and by reason of the fact that such moneyed capital taxed at a lesser rate or expressly untaxed or exempted wholly from taxation is, and has been during the years 1930, 1931 and 1932 to date, in substantial and actual competition with the business of the undersigned Bank in the City and County of Montgomery and in the State of Alabama, the purported assesment and the collection of taxes on account thereof on the shares of the capital stock of the undersigned Bank violated the provisions of the Fourteenth Amendment to the Constitution of the United States in that it denied the undersigned Bank and its shareholders the equal protection of the laws by seeking to exact taxation from the undersigned Bank and from its shareholders while not validly, effectively and legally exacting the same taxation from owners and holders of shares of capital stock of national banks located within the State of Alabama and within the

State and County of Montgomery and of the shares of other classes of corporations in substantial and actual competition with the business of the undersigned Bank in the State of Alabama and in the City and County of Montgomery, and of other moneyed capital in substantial and actual competition with the business of the undersigned Bank in the State of Alabama and the City and County of Montgomery, and the forcible collection thereof under the threats made by you in said notice and demand deprived the share-holders of the undersigned Bank and the undersigned Bank of their property without due process of law.

(6) For the same reasons and by reason of the same facts, said assessment and forcible collection violated the provisions of Section 217 of the Constitution of Alabama in that the statute under which said assessment was made violated, as aforesaid, the provisions of Section 5219 of the Revised Statutes of the United States and in that the laws of Alabama with reference to the assessment of taxes on shares of corporations located in the State of Alabama [fol. 16] and with reference to the assessment of taxes on moneyed capital in competition with the business of the undersigned Bank assess and levy taxes thereon at a lesser rate than that under which said collection has been forcibly made from the undersigned Bank, or are left untaxed or expressly exempted wholly from taxation, whereas said Section 217 of the Constitution of Alabama requires that "the property of private corporations, associations and individuals of this State shall forever be taxed at the same rate."

(7) The State of Alabama having sought and attempted by said Section 6, General Acts of 1923, page 152, to tax the shares of national banks located within the State of Alabama in compliance with Section 5219 of the Revised Statutes of the United States as thereby permitted, but having failed so to do for the reasons and matters aforesaid, and having sought and attempted by said Section 6, General Acts of 1923, page 152, to likewise tax the shares of banks and banking associations incorporated under the laws of the State of Alabama, but having failed to validly and legally levy a tax upon the shares of such national banks for the reasons hereinabove set forth, said Section 6, General Acts of 1923, page 152, became void and of no

legal effect as to the shares of banking institutions incorporated under the laws of the State of Alabama, including the undersigned Bank, leaving the same, together with the shares of national banks, expressly untaxed and not subject to taxation.

(8) The assessment on account of which you demanded payment of said amount hereby paid under protest was illegal and void and in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

(9) The assessment on account of which you demanded payment of said amount hereby paid under protest was illegal and void and in violation of Section 217 of the Constitution of Alabama.

(10) The law under which said assessment was made was when the assessment was made, and is, void and of no effect and violated Section 1 of the Fourteenth Amendment of the Constitution of the United States and Section 217 of the Constitution of Alabama.

(11) The amount of taxes, interest and fees forcibly collected by you from the undersigned Bank has been erroneously, illegally, invalidly, and unconstitutionally assessed and collected.

You are hereby notified that any distribution you may make of the payment of the amount hereby paid under protest as aforesaid will be at your own peril and that you will be held to respond personally to judgment in said action at law which will be commenced forthwith by the undersigned Bank.

Union Bank & Trust Company, by Grover Keyton,
Its Secretary.

[fol. 17] In Circuit Court of Montgomery County

Demurrers to Counts One and Two of Complaint—Filed March 17, 1932

Comes the defendant in the above styled cause and demurs to Counts 1 and 2 of the complaint herein filed and for grounds of demurrer, separately and severally, says:

1. That it affirmatively appears from the complaint that the plaintiff is not entitled to the relief sought.

2. That the complaint sets up no facts entitling plaintiff to judgment.

3. That the complaint affirmatively shows that the assessment against the shares of plaintiff was regularly and legally made and that taxes paid thereon were due.

4. That from aught that appears plaintiff was liable for the amount of the taxes paid and herein sought to be refunded.

5. That the complaint affirmatively shows that the assessment on the shares of plaintiff Bank was regularly made, that no protest or appeal from such assessment was ever made, and that the taxes paid and here sought to be recovered were due and payable, and plaintiff was liable therefor.

6. That Section 6 of the Act of the Legislature of 1923, Acts 1923, pages 161 and 162, is a valid and constitutional enactment.

7. That no facts are set up showing wherein plaintiff's legal rights have been invaded or its due process of law denied by any unconstitutional provision of said Section 6 of the Act of the Legislature approved August 22, 1923.

8. That said Section 6 is not violative of Section 217 of the Constitution of Alabama as averred.

9. That said Section 6 is not violative of Section 211 of the Constitution of Alabama as averred.

10. That this Court judicially knows that under the laws of the State of Alabama shares of national and state banks are taxable at the same rate and any immunity therefrom which national banks may enjoy is by virtue of the Act of Congress and not from the State of Alabama or its tax enforcement agencies.

11. That the complaint shows on its face that so far as plaintiff is concerned, said Section 6 of the Act approved August 22, 1923, is valid and constitutional.

[fol. 18] 12. That the averments that Section 6 of the Act approved August 22, 1923, is violative of Sections 217 and 211 of the Constitution of Alabama are mere conclusions of the pleader.

13. That from aught that appears the Legislature of Alabama has the right and power to exempt from taxation the species of property set out in paragraph 5, count 1 of the complaint.

14. That the averment that the failure to tax the shares of national banks constitutes an illegal discrimination against plaintiff is a mere conclusion of the pleader.

15. The averment that the State of Alabama has by other statutes left untaxed or expressly exempted from taxation other moneyed capital and that this action unlawfully and illegally discriminates against plaintiff so as to render the taxation of shares of plaintiff void is a mere conclusion of the pleader.

16. This Court judicially knows that it is the Legislature's prerogative to select its own subjects of taxation and it so doing is not violative of any Section of the State Constitution or the 14th Amendment to the Federal Constitution.

17. That this Court judicially knows that Section 6 of the Act approved August 22, 1923, is not a classification for taxation purposes, but provides a method of assessment and administration.

Thomas E. Knight, Jr., Attorney General; Frontis H. Moore, Assistant Attorney General, Attorneys for Defendant.

In Circuit Court of Montgomery County

Pleas—Filed March 17, 1932

Comes the defendant and files the following pleas to counts 1 and 2 of the complaint.

1. That he is not indebted to plaintiff in the manner and form alleged.

2. That the defendant ought not recover the amount sued for, for the following reasons:

A. The assessment on which these taxes were paid was regularly made, plaintiff was given due notice of the same

[fol. 19] and made no protest or appeal, or was heard in any wise to complain until demand was made upon it for payment of the taxes due, and defendant avers that such protest and this suit come too late.

B. That there is no classified property taxation system in the State of Alabama and that the arrangement of state and national banks in one Section as appears in Section 6 of the Act approved August 22, 1923, is not a classification for taxation purposes but is a method of assessment. That the Legislature cannot and did not by such procedure classify property nor levy different rates of taxation but taxed all property declared by it to be taxable at the same rate. Defendant admits that the shares of certain national banks presumably competing with plaintiff have escaped share taxation, but defendant avers that this is by virtue of the limitations put upon the State's power to tax them by the Congress of the United States, and that by the law of the State of Alabama they are taxed at the same rate as plaintiff. And Defendant avers that the states have no power to tax national banks except as given it by Congress and that the failure or refusal of Congress to give plenary power to the states in the matter of share taxation, cannot relieve the defendant of its liability for such taxes and that the failure to tax the shares of national banks because of congressional limitations does not constitute a discrimination in violation of the State or Federal Constitutions.

C. Defendant further avers that the Legislature has the right and power to select its own subjects of taxation and to exempt such as it sees fit. That the exemption of shares of mortgage companies and the other species of property named in the complaint is the legitimate prerogative and its exercise does not constitute the taxation of property at a different rate and contrary to Sections 211 and 217 of the State Constitution. Defendant further avers that such exemptions do not render the taxation of plaintiff's shares void and unconstitutional.

Thomas E. Knight, Jr., Attorney General; Frontis H. Moore, Assistant Attorney General, Defendant's Attorneys.

[fol. 20] IN CIRCUIT COURT OF MONTGOMERY COUNTY

PLAINTIFF'S DEMURRERS TO DEFENDANT'S SPECIAL PLEAS—
Filed March 17, 1932

Now comes the plaintiff in the above styled cause and demurs to each plea of the defendant filed therein, separately and severally, and as grounds of said demurrer sets down and assigns, separately and severally, the following:

(1) For that no sufficient facts are stated in said plea.

(2) For that said plea tenders an immaterial issue.

(3) For that no facts are stated in said plea which constitute a sufficient answer to the cause of action stated in each count set out in plaintiff's complaint.

(4) For that the facts set out in said plea do not constitute an estoppel against this plaintiff from maintaining the causes of action stated in the counts of its complaint.

(5) For that it does not appear that there was any duty on the part of the plaintiff to make any protest of or appeal from the said assessment.

(6) For that it does not appear to whom the plaintiff should have made any protest after said assessment was made.

(7) For no sufficient facts are stated in said plea to sustain the conclusion that this suit was filed too late.

(8) For that it appears there was no duty on the part of the plaintiff to make any protest or to take any appeal from said assessment.

(9) For that it does not appear that plaintiff was under any duty to complain to anyone of said assessment.

(10) For that no sufficient facts are stated in said plea in bar of the maintenance of said cause of action stated in each of plaintiff's said counts.

(11) For that it appears from the allegations stated in said plea that the State of Alabama could not validly tax the shares of capital stock of the plaintiff without taxing the shares of capital stock of national banking associations doing business in Alabama.

(12) For that no facts are stated in said plea which show that the State of Alabama has legally taxed the shares of capital stock of the plaintiff.

(13) For that it does not appear from the allegations of said plea that the State of Alabama has validly taxed the [fol. 21] shares of capital stock of plaintiff bank.

(14) For that no facts are stated in said plea which show that the defendant was authorized to collect from the plaintiff the amount of taxes which the plaintiff seeks to recover in this action.

(15) For that no facts are stated in said plea to show that the defendant could legally exact from the plaintiff the amount of money he collected from plaintiff under protest as taxes on its shares of capital stock.

(16) For that no facts are stated in said plea which bar a recovery by the plaintiff of the amounts sued for in its complaint.

(17) For that no facts are stated in said plea to sustain the conclusion that there has been no unconstitutional discrimination against the plaintiff in the attempted efforts by the State to tax the shares of capital stock of plaintiff bank.

(18) For that no sufficient facts are stated in said plea to excuse the State of Alabama in not taxing shares of capital stock of national banks and shares of capital stock of the plaintiff at the same rate.

(19) For that it affirmatively appears from the allegations of said plea that the State of Alabama has not validly taxed the shares of capital stock of national banking associations doing business in this State.

(20) For that it does not appear from the allegations of said plea that the State of Alabama can validly tax the shares of capital stock of plaintiff bank and fail to tax the shares of capital stock of national banking associations doing business in the State of Alabama.

(21) For that it does not appear that the State of Alabama can exempt from taxation shares of capital stock of mortgage companies and other species of property men-

tioned in said plea and validity tax the share of capital stock of the plaintiff.

(22) For that it affirmatively appears that the State of Alabama in atempting to tax shares of capital stock of the plaintiff bank has violated Section 211 of the Constitution of the State of Alabama.

(23) For that it affirmatively appears that the State of Alabama in attempting to tax shares of capital stock of the plaintiff has violated Section 1 of the 14th Amendment to the Constitution of the United States.

[fol. 22] (24) For that no sufficient facts are stated in said plea to sustain the conclusion that the exemptions from taxation stated in said plea do not render the taxation of plaintiff's shares of capital stock void and unconstitutional.

(25) For that legal conclusions are stated in said plea which are not sustained by the facts set out in said plea.

(26) For that no facts are set out in said plea which show that the State of Alabama could collect an ad valorem tax on the shares of the capital stock of plaintiff for the tax year beginning October 1st, 1930, and ending September 30th, 1931.

(27) Said plea neither confesses and avoids the allegations contained in the count to which it is pleaded nor sets up any fact in bar thereof.

(28) For that no facts are stated in said plea which would operated as an estoppel to the maintenance of the cause of action stated in each of the counts of plaintiff's complaint to which said plea is interposed.

(29) For that said plea is argumentative.

(30) For that all of the facts stated in said plea are available to the defendant under the plea of the general issue.

William B. White, John S. Coleman, Counsel for Plaintiff. Bradley, Baldwin, All & White, of Counsel.

[fol. 23] IN CIRCUIT COURT OF MONTGOMERY COUNTY

[Title omitted]

JUDGMENT—March 23, 1932

This day came the parties and by their attorneys and the Defendant's demurrer to the complaint being argued by counsel and understood by the Court, and being considered by the Court, it is considered, ordered and adjudged by the Court that the Defendant's demurrer to the complaint be and the same is hereby overruled. The Plaintiff's demurrer to the Defendant's special pleas 2A, B and C being argued by counsel and understood by the Court, and being considered by the Court, it is considered, ordered and adjudged by the Court that the Plaintiff's demurrer to the Defendant's special pleas 2A, B and C be and the same is hereby sustained. And issue being joined on the Defendant's plea of general issue and after hearing the evidence, the Court being of the opinion, it is considered and ordered by the Court, and it is the judgment of the Court, that judgment be and the same is hereby rendered in favor of the plaintiff and against the defendant for the sum of Two thousand, five hundred twenty-one and 69/100ths dollars ($2,521.69).

It is therefore considered, ordered and adjudged by the Court that the plaintiff have and recover of the defendant the said sum of Two thousand, five hundred twenty-one and 69/100ths dollars ($2,521.69), together with the costs in this behalf expended, and for all of which execution may issue.

[fol. 24] IN CIRCUIT COURT OF MONTGOMERY COUNTY

Bill of Exceptions—Filed March 29, 1932

Be it remembered that at the said term of said Court on to-wit, the 23rd day of March, 1932, present the Honorable Walter B. Jones, Judge of said Court, and the Court being duly called in the case of Union Bank and Trust Company, Plaintiff, vs. R. C. Phelps, individually and as Tax Collector of Montgomery County, Defendant, the following among other proceedings were had:

Defendant demurred to Counts 1 and 2 of the complaint as appears by his demurrers numbered 1 to 17, filed in said cause, which demurrers were overruled by the Court and the Defendant then and there duly and legally excepted. Defendant thereupon filed plea 1, the general issue, and special plea #2, to the complaint. Plaintiff demurred to said special plea of Defendant as appears by his demurrers numbered 1 to 30 as filed in said cause, which demurrers were sustained by the Court and to which action of the Court the Defendant then and there duly and legally excepted.

Thereupon the following agreed statement of facts was introduced:

IN CIRCUIT COURT OF MONTGOMERY COUNTY

[Title omitted]

AGREED STATEMENT OF FACTS

The plaintiff, by its attorneys of record, Messrs. Bradley, Baldwin, All & White, and the defendant, by his attorney of record, Thomas E. Knight, Attorney General of the State of Alabama and Frontis H. Moore, assistant Attorney General of Alabama, hereby agree and stipulate that the following are the facts in the above entitled cause:

First. Plaintiff is a State banking corporation duly organized and existing now and at the times hereinafter mentioned as a State Bank under and pursuant to the laws of the State of Alabama, which is, and was at the times hereinafter mentioned, located and conducting its principal business and had its principal and only office in the City of Montgomery and in the County of Montgomery, Alabama. Plaintiff, in the conduct of its business as a State Bank and pursuant to its charter and [fol. 25] statutory rights as a State Bank, carried on, during the times hereinafter mentioned, at said place of business in said City and County of Montgomery, a general commercial and savings bank business. It received and accepted deposits from persons, firms, associations and corporations residing or located and doing business in said City and County and also in other cities and counties in the State of Alabama and elsewhere. It made loans to

persons, firms, associations and corporations residing or located and doing business in said City and County and also in other cities and counties in the State of Alabama and elsewhere on real estate and personal property security, and without security. It purchased and dealt in and with real estate mortgages, bonds of the State of Alabama and of the United States and other States, and bonds and other obligations and securities of governmental subdivisions of said State and of the United States and other States and of private corporations and others. It carried on generally the same businesses as the businesses conducted by National Banks located in said City, County and State except the issue of currency.

Second. Defendant is the Tax Collector for the County of Montgomery in the State of Alabama.

Third. On Dec. 16, 1930, plaintiff made and filed with the Tax Assessor of the County of Montgomery, Alabama, a return of its real estate and tangible personal property. On the same date plaintiff made and filed with the said Tax Assessor a return of its shares of capital stock.

Fourth. On July 23, 1931, the Tax Assessor of the County of Montgomery, Alabama, listed the value for ad valorem taxation for State and County purposes of said real estate and tangible personal property at $36,290.00 Dollars. No protest or complaint was made thereto by plaintiff, and on account of said real estate and tangible personal property there has been entered upon the final assessment roll of the County of Montgomery, Alabama, for the tax period beginning October 1, 1930, and ending September 30, 1931, an assessment of $725.80 Dollars.

Fifth. On July 23, 1931, the Tax Assessor of the County of Montgomery, Alabama, listed the value for ad valorem taxation for State and County purposes of said shares of [fol. 26] plaintiff's capital stock at $124,235.00 Dollars. No protest or complaint or objection to the value so listed was then, or at any time prior to the completion of the final assessment roll of said County, made by the plaintiff or any of its shareholders, and on account of said shares of plaintiff's capital stock there has been entered upon the final assessment roll of the County of Montgomery, Alabama, for the tax period beginning October 1, 1930, and

ending September 30, 1931, an assessment of $2,484.70 Dollars.

Sixth. On March 7, 1932, the defendant made demand on plaintiff for payment of a total of $3,259.53 Dollars of taxes on account of the foregoing assessments, with interest thereon from January 1, 1932, to date. Said demand was made in writing and a true copy of said writing is hereto attached, marked "Exhibit C".

Seventh. Following said demand plaintiff made to defendant payment of the amount of the taxes and interest thereon from January 1, 1932, due on account of said assessment of plaintiff's real estate and tangible personal property by check in the amount of $737.84 Dollars, admitting plaintiff's liability for that amount, but under protest in writing plaintiff made to defendant payment of the amount of the taxes and interest thereon claimed by defendant to be due on account of said assessment of the shares of plaintiff's capital stock by check expressly stated to be given under protest, in the amount of $2,521.69 Dollars, denying plaintiff's liability for said amount and the liability of plaintiff's shareholders for said amount, said payment being accompanied by written protest, a true copy of which is hereto attached, marked "Exhibit D."

Eighth. In the State of Alabama during 1930, 1931 and 1932 to date, there were many hundreds of thousands of dollars of moneyed capital in substantial and actual competition with the business of both National Banks and State Banks located in the County of Montgomery and in the State of Alabama other than moneyed capital representing merely personal investments and not made in competition with such banking business, used and employed in the business of mortgage companies, industrial loan companies, investment security dealers and companies, building and loan associations, insurance companies and corporations, and individuals engaged in financial businesses, all of which loaned money on real and personal security and without security, some of which dealt in investment securities and otherwise used moneyed capital in substan- [fol. 27] tial and actual competition with the business of both National Banks and State Banks, which moneyed capital is, and was during said period, taxed at a lesser

rate in the sense of burden imposed, than the rate of taxation sought by Section 6 of the General Acts of 1923, page 152, to be exacted upon the shares of National Banks and the shares of State Banks located within the State of Alabama, or is, and was during said period, expressly untaxed or exempted wholly from taxation.

Ninth. During said years 1930, 1931 and 1932 to date, there were and are building and loan associations, industrial loan companies and corporations, and industrial banks which engaged in business in the City of Montgomery, Montgomery County, Alabama, and loaned money in substantial and actual competition with the National Banks located in said City and County of Montgomery and in substantial and actual competition with the plaintiff State Bank to the extent of hundreds of thousands of dollars, the shares of capital stock and capital of which were, during said period, exempted from the assessment and payment of ad valorem taxes and were left by the laws of Alabama entirely untaxed, or were taxed at a lesser rate, in the sense of burden imposed, than the said shares of plaintiff or the shares of National Banks. During said period there were likewise mortgage companies and corporations making loans on real estate in the City of Montgomery and County of Montgomery and purchasing mortgages and mortgage notes on real estate in said City and County to the extent of many thousands of dollars in substantial and actual competition with the businesses conducted by the National Banks located in the City of Montgomery, Montgomery County, Alabama, and the plaintiff bank, which were exempted by the laws of Alabama from any tax upon their shares of capital stock or capital or left by the laws of Alabama wholly untaxed for ad valorem tax purposes with respect to their shares of capital stock, or were taxed at a lesser rate, in the sense of burden imposed, than the said shares of plaintiff or the shares of National Banks. During said period, there were insurance companies organized under the laws of Alabama and doing business in said City of Montgomery, Alabama, lending money on mortgages and purchasing state, municipal and other bonds in substantially the same manner as state and national banks located in Alabama, to the extent of many thousands of dollars, which were entitled to certain credits or exemptions in computation of the tax assessed upon their shares

[fol. 28] of capital stock or capital by the laws of the State of Alabama for ad valorem tax purposes, which credits or exemptions were not accorded under the laws of Alabama in computation of assessments on the shares of capital stock or capital of said National Banks and State Banks, including said shares of plaintiff bank. During the said period, in the conduct of plaintiff's business and in the conduct of the businesses of the National Banks located in said City and County and in lending money and purchasing notes, bonds, stocks and securities, plaintiff bank and said National Banks found in actual and substantial competition with them other individuals, persons, firms, associations and corporations engaged in like business or businesses and using moneyed capital therein to the extent of many thousands of dollars, which moneyed capital was not assessed or taxed for ad valorem taxes under the laws of Alabama and was either expressly exempted by said laws or left untaxed by said laws, or was taxed, at a lesser rate, in the sense of burden imposed, than the said shares of plaintiff or the shares of National Banks. During said period, a large amount of property of like character to that of the shares of capital stock and capital of plaintiff bank and said National Banks, in the form of money loaned, bills and notes discounted, securities bought and sold, by a large number of persons, firms and corporations engaged in like businesses to the businesses of said National Banks and State Banks, including plaintiff bank, to the extent of many thousands of dollars in actual and substantial competition with the business of said National Banks and plaintiff bank was not assessed for taxation but was exempted by the laws of Alabama from ad valorem taxation or left untaxed by said laws, or was taxed at a lesser rate, in the sense of burden imposed, than the said shares of plaintiff or the shares of National Banks.

Tenth. During the time herein mentioned there were located and doing business in said City and County of Montgomery two National Banks and in the State of Alabama many National Banks which carried on the businesses of receiving and accepting deposits from persons, firms, associations and corporations residing or located and doing business in said City and County and also in other cities and counties in the State of Alabama and elsewhere, making loans to persons, firms, associations and corporations

residing or located and doing business in said City and County of Montgomery and also in other cities and counties in the State of Alabama and elsewhere on real estate and [fol. 29] personal property security, and without security, and purchasing and dealing in and with real estate mortgages, bonds of the State of Alabama and of the United States and other States, and bonds and other obligations and securities of governmental subdivisions of said State of Alabama, the United States and other States, and of private corporations and others and engaged generally in the business of commercial and savings banks. The said businesses carried on by said National Banks were and are in substantial and actual competition with the businesses carried on and transacted by the plaintiff during the time herein mentioned.

Eleventh. That many of the corporations hereinabove mentioned are corporations organized and existing under the laws of Alabama and that during the times herein mentioned thousands of the shares of the capital stocks of said Alabama corporations were held and owned by the shareholders thereof.

Twelfth. Under date of January 29, 1932, the Attorney General of Alabama rendered to the defendant herein an opinion in writing, a true copy of which is hereto attached, marked "Exhibit E".

Thirteenth. In a number of adjudicated cases District Courts of the United States for the Alabama Districts have decided, and entered judgment accordingly, that the shares of capital stock of certain National Banks located in the State of Alabama are not legally taxed under Section 6 of said Act of the Legislature of 1923 and cannot be legally taxed nuder the laws of Alabama in that said Section 6 of said Act violates the provisions of Section 5219 of the Revised Statutes of the United States, viz: The National Banks located in Dothan, Alabama, Selma, Alabama, and Troy, Alabama, and no appeals have been taken from said decisions or are intended to be taken. The time for appeal from the decisions with respect to said National Banks located in Dothan, Alabama, and Selma, Alabama, has expired.

Fourteenth. That the Tax Collector of Montgomery County, Alabama, has not collected and has made no effort to collect and has announced his intention to make no effort to collect any tax sought to be imposed by said Section 6 of said Act of the Legislature of 1923 upon the shares of National Banks located in the City of Montgomery during the aforesaid times.

[fol. 30] Fifteenth. The sum of $2,521.69 paid by plaintiff to defendant on account of the tax claimed by defendant to be due as taxes on plaintiff's said shares of capital stock for the tax year beginning October 1st, 1930, and ending September 30th, 1931, is now in the hands of the defendant.

William B. White, John S. Coleman, Attorneys for Plaintiff. Bradley, Baldwin, All & White, of Counsel. Thomas E. Knight, Jr., Attorney General; Frontis H. Moore, Assistant Attorney General of Alabama, Attorneys for Defendant.

Exhibit C to agreed statement of facts omitted; printed side page 13 ante.

[fols. 31 & 32] Exhibit D to agreed statement of facts omitted; printed side page 14 ante.

[fols. 33-35] Exhibit E to agreed statement of facts omitted; printed side page 11 ante.

[fol. 36] This was all the evidence in the case and the cause was thereupon submitted to the Court for final judgment.

The Court rendered judgment in favor of the Plaintiff in the sum of $2,521.69 together with costs, to which action and judgment of the Court the Defendant then and there duly and legally excepted.

Wherefore the said R. C. Phelps, Defendant in the above styled cause, prays that this be taken as his legal bill of

exceptions in said cause upon the same being duly signed according to law by his Honor, Walter B. Jones, Judge of the 15th Judicial Circuit, who presided in the trial of said cause.

Tendered this 29 day of March, 1932.

Walter B. Jones, Judge 15th Judicial Circuit.

Approved and filed this 29 day of March, 1932.

Walter B. Jones, Judge 15th Judicial Circuit.

In Circuit Court of Montgomery County

Notice and Security for Costs of Appeal—Filed March 26, 1932

Comes the defendant, R. C. Phelps, in the above styled cause and hereby appeals to the Supreme Court of Alabama from the judgment of the Circuit Court of Montgomery County rendered in said cause on the 23 day of March, 1932, in favor of the plaintiff.

Thos. E. Knight, Jr., Attorney General; Frontis H. Moore, Assistant Attorney General, Defendant's Attorneys.

We hereby acknowledge ourselves security for all costs of the foregoing appeal.

W. H. Stevens.

Approved this 26th day of March, 1932.

H. N. Hughes, Clerk.

[fol. 37] Citation, in usual form, showing service on John S. Coleman, omitted in printing.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 38] IN SUPREME COURT OF ALABAMA

R. C. PHELPS, Individually and as Tax Collector of Montgomery County, Alabama, Appellant,

vs.

UNION BANK & TRUST Co., Appellee

ASSIGNMENTS OF ERROR

Appeal from the Circuit Court of Montgomery County

Comes R. C. Phelps, Individually and as Tax Collector, Appellant in the above styled cause and assigns the following errors appearing in the transcript of the record of the court below, and for grounds of error assigns the following:

I. That the court below erred in overruling defendant's (Appellant here) demurrer to counts one and two of the original complaint. Tr. pages 17-18. Tr. page 23.

II. That the court below erred in overruling defendant's (Appellant) demurrer to counts 1 and 2 of the complaint, grounds 1 to 17, inclusive, separately and severally. Tr. P-. 17-18-23.

III. That the court below erred in overruling the defendant's (Appellant) demurrer to the complaint and counts 1 and 2 thereof as shown by grounds of demurrer numbered 1-17 inclusive, separately and severally (Tr. P-. 17-18-23).

IV. That the court below erred in overruling defendant's (Appellant) demurrer to counts 1 and 2 of the complaint and specifically, the court erred in overruling defendant's grounds of demurrer numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, separately and severally. Tr. P-. 17-18-23.

V. That the court below erred in sustaining plaintiff's (Appellee here) demurrer to special plea numbered 1-A-B-C of defendant (Appellant here). Tr. P-. 20-21-23.

VI. That the court below erred in sustaining plaintiff's (Appellee) demurrer to special plea 1-A-B-C of defendant (Appellant) and specifically erred in sustaining such de-

murrer on grounds numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30 separately and severally (Tr. P-. 20-21-23).

VII. That the court below erred in and by its final judgment in rendering judgment in favor of the plaintiff (Appellee here). Tr. P. 23.

[fol. 39] VIII. The court below erred in and by its final judgment in rendering judgment in favor of plaintiff (Appellee) and in not rendering judgment in favor of defendant (Appellant). Tr. P. 23.

IX. That the court below erred in rendering final judgment in favor of plaintiff (Appellee) and in not rendering judgment in favor of defendant (Appellant) because:

Said judgment was contrary to the law in the case.

Said judgment was contrary to the evidence in the case.

Said judgment was contrary to the law and evidence in the case. Tr. P. 23.

Wherefore Appellant prays that said judgment of the circuit court of Montgomery county be reversed and judgment here rendered in favor of Appellant.

This April 7, 1932.

R. C. Phelps, Individually and as Tax Collector of Montgomery County, by Thomas E. Knight, Jr., Attorney General; Frontis H. Moore, Ass't Attoney General, His Attorneys.

To Union Bank & Trust Co., appellee, or to W. B. White, John S. Coleman, Bradley, Baldwin, All & White, its attorneys:

You will take notice of the foregoing assignments of error.

This April 7, 1932.

R. C. Phelps, Individually and as Tax Collector, Appellant, by Thomas E. Knight, Jr., Attorney General; Frontis H. Moore, Ass't Atty. Gen'l, His Attorneys.

[fol. 40] IN SUPREME COURT OF ALABAMA

[Title omitted]

ARGUMENT AND SUBMISSION—April 8, 1932

Come the parties, by attorneys, and argue and submit this cause for decision.

IN SUPREME COURT OF ALABAMA

[Title omitted]

JUDGMENT—May 19, 1932

Come the parties by attorneys, and the record and matters therein assigned for errors, being argued and submitted, and duly examined and understood by the Court, it is considered that in the record and proceedings of the Circuit Court there is manifest error. It is therefore considered that the judgment of the Circuit Court be reversed and annulled, and the cause remanded to the said Court for further proceedings therein.

It is also considered that the Appellee pay the costs of appeal of this Court and of the Circuit Court.

[fol. 41] IN SUPREME COURT OF ALABAMA

[Title omitted]

DOCKET ENTRY

June 1st, 1932.—Application for rehearing filed by Appellee.

IN SUPREME COURT OF ALABAMA

[Title omitted]

ORDER DENYING APPLICATION FOR REHEARING—June 16, 1932

It is ordered on rehearing that the judgment of the Court rendered on May 19th, 1932, reversing the judgment of the

Circuit Court and remanding the cause be set aside and vacated. Whereupon, the record and matters therein assigned for errors being argued and submitted, and duly examined and understood by the Court, it is considered that in the record and proceedings of the Circuit Court there is manifest error. It is therefore considered that the judgment of the Circuit Court be reversed and annulled, and this Court proceeding to render the judgment the Circuit Court should have rendered, doth order and adjudge that there be judgment for the defendant, and that the defendant go hence, and have and recover of the plaintiff his costs in this behalf expended, for which execution may issue.

It is also considered that the appellee pay the costs of appeal of this Court and of the Circuit Court.

[fol. 42] IN SUPREME COURT OF ALABAMA

[Title omitted]

OPINION

Per CURIAM:

The inherent power of the State to collect taxes to raise revenue on property within its jurisdiction and on domestic concerns is an attribute of sovereignty residing in the Legislature, and so long as it does not impinge the limitations fixed by the Constitution, or trench upon the prerogatives of the National Government, or violate the guarantees of the Fourteenth Amendment of the Constitution of the United States, its powers are unlimited and unrestrained. This power is not a delegated power, but a power inherent in the State, essential to its life and continued existence.—Phœnix Carpet Co. v. The State, 118 Ala. 143; Ohio Oil [fol. 43] Company v. Conway, 281 U. S. 146 (159).

The power to tax the stock in banks of the United States,—agencies of the National Government, in the accomplishment of its constitutional purposes,—is not an inherent power residing in the State, but a power delegated by Congress. Such agencies cannot be taxed except by the consent of Congress.—Cooley's Const. Law (8th Ed.), Page 991.

In the exercise of this delegated power the Legislature must conform to the restrictions in the acts of Congress delegating this power, otherwise the effort of the Legislature to exercise this power is abortive and void.—Ward, Tax Collector v. First National Bank of Hartford, MS; Mercantile Bank v. New York, 121 U. S. 138.

The limitation on the power of the Legislature to levy a direct tax on property, found in §§211 and 217 of our Constitution, is a limitation on the inherent power of the State, and not on the power to tax delegated by the Federal statute. The limitation on this power is found in Section 5219 of the United States Revised Statutes.—Maguire v. Board of Revenue and Road Commissioners of Mobile County, 71 Ala. 401; Pollard v. The State, ex rel. Zuber, 65 Ala. 628.

Therefore, when the Legislature, in the exercise of the power delegated by the Federal statute efficaciously levies a tax on the stock of United States Banks, in conformity with the statute, such levy reflects the limitation embodied in the Constitution in respect to the levy on subjects of taxation within the inherent power of the State, and requires [fol. 44] substantial uniformity. Such was the case dealt with in State Bank v. Board of Revenue, 91 Ala. 217.

But where, as in the case at bar, the attempted exercise of the delegated power of taxation under the Federal statute is abortive, there is no basis for applying the limitation embodied in Section 217 of the Constitution to taxes levied in the exercise of the State's inherent power on domestic bank stock; therefore, the plaintiff was not entitled to recover.

We are in full accord with the minority view that there is "no semblance of justice in taxing the shares of State banks and excluding those of National banks." But we entertain the view the remedy for such injustice lies with the law-making power of the State and Federal Government, by amendment of the Federal statute, as now proposed by the pending bill in Congress, so as to permit the taxation of National banks in like manner and to like extent as State banks; and if this is not done, the Legislature should conform to the requirements of the Federal law. The result of such injustice in this particular instance does not justify a surrender of the inherent power of the sovereign state to tax its own subjects and exercise its own prerogatives.

Upon the question of taxation, the Legislature of this State had the power to make exemptions and classifications free from interference by the courts unless there results inequality, not only oppressive in its operation, but so glaring as that it can be judicially declared to be founded [fol. 45] on arbitrary and capricious principles, without the just semblance of reason. Subject to this limitation the legislative power to select proper subjects of taxation and to classify them upon principles which to them seem just, cannot be circumscribed by the courts. There must be, of necessity, left a liberal scope for the free exercise of this presumably wise discretion.—Moog v. Randolph, 77 Ala. 597.

Upon this well recognized principle the system of classification and exemption by the legislature as to moneyed capital is a matter resting within the law-making power, and is not such as to justify the interference by the court.

Like reasoning as outlined in this opinion leads to the conclusion that the State system of taxation here questioned violates no provision of the Fourteenth Amendment to the Constitution of the United States.—Ohio Oil Co. v. Conway, 281 U. S. 146.

The judgment of the circuit court is reversed and one here rendered for the defendant.

Reversed and rendered.

Gardner, Thomas, Brown and Knight, JJ., concur.
Anderson, C. J., Bouldin and Foster, JJ., dissent.

Bouldin, J. (dissenting):

Union Bank & Trust Company, a State banking corporation, paid under protest the ad valorem taxes assessed against its shareholders upon their shares of stock for the tax year ending September 30, 1931, and brought the present action against the Tax Collector to enforce a refund.

Broadly stated the theory of the suit is that by a course of legislation, exempting, or omitting as subjects of taxa- [fol. 46] tion, other moneyed capital, the tax structure of the State is such as to work a repeal of the statute subjecting shares of stock in State banks to ad valorem taxation. This by force of the uniformity provisions of our State Constitution. The Federal law dealing with the taxation of shares in National banks is brought under consideration

as affecting the status upon which our Constitution operates.

We take note, first, of the statutes and constitutional provisions involved.

Section 5219, United States Revised Statutes, reads:

"Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the State within which the association is located; but the legislature of each State may determine and direct the manner and place of taxing all the shares of national banking associations located within the State, subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State, and that the shares of any national banking association owned by non-residents of any State shall be taxed in the city or town where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either State, county, or municipal taxes, to the same extent, according to its value, as other real property is taxed."

National banks being agencies or instrumentalities of the Federal Government in relation to its currency and fiscal affairs, the power of Congress to impose restrictions preventing discrimination by State tax laws against the holders of stock in such banks in favor of competing moneyed capital, has been long settled, and is unchallenged.

[fol. 47] "The terms of the act of Congress, therefore, include shares of stock or other interests owned by individuals in all enterprises in which the capital employed in carrying on its business is money, where the object of the business is the making of profit by its use as money. The moneyed capital thus employed is invested for that purpose in securities by way of loan, discount, or otherwise, which are from time to time, according to the rules of the business, reduced again to money and reinvested."—Mercantile Bank v. New York, 121 U. S. Rep. p. 157.

"All taxes levied on property in this State shall be assessed in exact proportion to the value of such property."—Constitution of Alabama, Section 211.

"The property of private corporations, associations, and individuals of this State shall forever be taxed at the same rate."—Constitution of Alabama, Section 217.

In Mayor, &c., of Mobile v. Stonewall Insurance Company, 53 Ala. 570, this court considered a provision of the Constitution of 1868 to like effect as Section 217 of our present Constitution above quoted. That case dealt with a statute prescribing a different and lower rate of municipal taxation upon certain moneyed capital employed by corporations from that similarly employed by individual citizens. In an extended opinion by Chief Justice Brickell, among other things, the court declared:

"Invidious exemptions or discriminations, by which the property of an individual, or of a corporation, is relieved from bearing a just proportion of the common burden taxation is intended to discharge, or violative of the equality of right of the citizen, which is a fundamental principle of [fol. 48] our institutions. To prevent any exemption or discrimination in favor of corporations, to subject their property to the same rate of taxation to which the property of individuals of the same kind is subject, is the purpose of the constitutional provision, clearly expressed: 'The property of corporations now existing, or hereafter created, shall forever be subject to taxation, the same as property of individuals,' &c. * * * If property of a particular kind is subjected to taxation, and owned by a corporation, it must bear the rate of taxation imposed on individuals. While the constitution inhibits the exemption or discrimination in favor of corporations, it equally inhibits a discrimination against them. Equality in bearing a common burthen, which is natural right and equity, is secured alike to the corporation and to the citizen."—53 Ala. pp. 579, 580, 581.

We note that, in the above case, it appearing that provision was made by law for assessment of such property, the court held the discriminatory provision invalid and subjected the property to the same rate as like property assessed to individuals.

In National Commercial Bank of Mobile v. Mayor, Aldermen & Common Council of Mobile, 62 Ala. 284, this court considered Section 5912 of United States Revised Statutes,

above quoted. A distinction was there drawn between the capital of a national bank and the shares as private property of the individual shareholder, quoting the following from Van Allen v. The Assessors (3 Wal. 573):

"'The tax on the shares is not a tax on the capital of the bank. The corporation is the legal owner of all the property of the bank, real and personal, and within the powers conferred upon it by the charter and for the purposes for which it was created, can deal with the corporate property as absolutely as a private individual can deal with his own.' 'The interest of the shareholder entitled him to participate in the net profits earned by the bank in the employment of its capital,' &c. 'This is a distinct, independent interest or property, held by the shareholder like any other property that may belong to him. Now, it is this interest which the act of Congress has left subject to State taxation under the limitations prescribed.'"—62 Ala. 294.

[fol. 49] To like effect, see Sumter County v. The National Bank of Gainesville, 62 Ala. 464.

In State Bank v. Board of Revenue, 91 Ala. 217, the court considered the effect of Sections 211 and 217 of our Constitution (then Sections 1 and 6 of the Constitution of 1875) along with Section 5219 of United States Revised Statutes, and directly applied the same to ad valorem taxes upon the shares of State banks and national banks. The statute then in force, apparently out of desire to avoid a possible conflict with the Federal statute, permitted a deduction of the indebtedness of the shareholder in a national bank from the value of his shares, taxing only the residue, if any; while no such deduction was allowed in assessing the shares in the State banks.

Defining the effect of Section 211 and 217 of our Constitution, in an opinion by Chief Justice Stone, it was said:

"What we do decide is, that whenever the legislature levies a tax on property, the rate must be in exact proportion to the value of such property; and that if a tax is imposed on any species of property, all property belonging to that species must be taxed at the same rate, whether it belongs to an individual, an association of persons, or to a private corporation. We mean by this, not only that, in this regard, natural persons, individuals or companies

stand on the same footing with private corporations, but also that each individual association, or private corporation, is, under our constitution, endowed with the same rights, and subject to the same burdens, as are enjoyed or suffered by every other natural person, association of persons, or private corporation. The following authorities render it unnecessary for us to go into the argument at greater length.—Mayor of Mobile v. Stonewall Ins. Co. 53 Ala. 570; State Auditor v. Jackson County, 65 Ala. 142; Maguire v. Board of Revenue, 71 Ala. 401. See, also, Nat. Commercial Bank v. Mayor, 62 Ala. 284; Sumter Co. v. Nat. Bank, Ib. 464; Perry Co. v. Railroad, 65 Ala. 391; Pollard v. State, ex rel., Ib. 628.

[fol. 50] "We need scarcely say that bank shares in a National bank, and bank shares in a State bank, belong to one species of moneyed capital. Any attempt to draw a distinction between them, as subjects of taxation, would be futile. In assessing the one, our statute allows a deduction of the taxpayer's indebtedness, and taxes the surplus. In assessing the other, it allows no such deduction. We hold that this is a violation of section 6, Art. XI of Alabama's Constitution, and that the shareholders in State banks are entitled to the same deductions as the statute accords to the share-holders of National banks."—91 Ala. 223.

Following this decision, the legislature, in the Revenue Act of 1895, construed in Jefferson County Savings Bank v. Hewitt, 112 Ala. 546, sought to remedy the defects of the former statute; and the legislature of 1896 further amended same as appears in the Code of 1896, Section 3911, Subd. 8.

This statute, intended to conform to all the requirements of Section 5219 of the Revised Statutes of the United States, listed as part of the taxable property of the State, every share in State banks and National banks. It provided a method of ascertaining the value of the shares, deduction of assessed value of real estate, assessment of the residue against the shareholders, and payment of such tax by the bank.

This scheme of taxing the shares in both State and National banks has been in force and re-enacted from time to time until this date.—General Acts 1923, p. 161, Section 6.

Provision is also made for taxation of unincorporated banks on substantially a like basis.—Acts 1923, Section 5, p. 160.

[fol. 51] The same law of 1896 listed the shares in other corporations as part of the taxable property of the State, and provided the method of assessment and payment.—Code of 1896, Section 3911, Subd. 9. This general scheme as to shares in domestic corporations has been re-enacted from time to time.—Acts of 1923, p. 162, Section 8.

In the General Revenue Act of 1927, this statute of 1923 as to shares in domestic corporations, other than banks and banking associations, was re-enacted without change of substance, save in the matter of exceptions or exemptions.—Acts 1927, p. 166, Section 25.

The Act of 1923 excepted shares in building and loan associations. The Act of 1927 added as exceptions "mortgage companies or corporations making loans on real estate or purchasing mortgages or mortgage notes on real estate and industrial loan companies or corporations," and concludes with the following:

"Provided, however, that the provisions of this Act, shall not apply to the shares of stock of domestic or foreign mortgage companies or corporations whose chief business is making loans on real estate, or purchasing mortgages and mortgage notes on real estate; nor shall this Act apply to the shares of domestic or foreign industrial loan companies or corporations, it being hereby expressly enacted that all shares of stock of such domestic and foreign mortgage companies or corporations and domestic and foreign industrial loan companies or corporations, shall be exempted from assessment and the payment of ad valorem taxes."—Gen. Acts 1927, page 168.

[fol. 52] With this legislative situation before us, we proceed to consider the case made by the present record.

The cause was tried upon an agreed statement of facts. The eighth, ninth and eleventh paragraphs of agreed facts are as follows:

"Eighth. In the State of Alabama during 1930, 1931 and 1932 to date, there were many hundreds of thousands of dollars of moneyed capital in substantial and actual competition with the business of both National Banks and State

Banks located in the County of Montgomery and in the State of Alabama other than moneyed capital representing merely personal investments and not made in competition with such banking business, used and employed in the business of mortgage companies, industrial loan companies, investment security dealers and companies, building and loan associations, insurance companies and corporations, and individuals engaged in financial businesses, all of which loaned money on real and personal security and without security, some of which dealt in investment securities and otherwise used moneyed capital in substantial and actual competition with the business of both National Banks and State Banks, which moneyed capital is, and was during said period, taxed at a lesser rate in the sense of burden imposed, than the rate of taxation sought by Section 6 of the General Acts of 1923, page 152, to be exacted upon the shares of National Banks and the shares of State Banks located within the State of Alabama, or is, and was during said period, expressly untaxed or exempted wholly from taxation.

"Ninth. During said years 1930, 1931 and 1932 to date, there were and are building and loan associations, industrial loan companies and corporations, and industrial banks which engaged in business in the City of Montgomery, Montgomery County, Alabama, and loaned money in substantial and actual competition with the National Banks located in said City and County of Montgomery and in substantial and actual competition with the plaintiff State Bank to the extent of hundreds of thousands of dollars, the shares of capital stock and capital of which were, during said period, exempted from the assessment and payment of ad valorem taxes and were left by the laws of Alabama entirely untaxed, or were taxed at a lesser rate, in the sense of burden imposed, than the said shares of plaintiff or the shares of National Banks. During said period there were likewise mortgage companies and corporations making loans on real estate in the City of Montgomery and County of Montgomery and purchasing mortgages and mortgage notes on real estate in said City and County to [fol. 53] the extent of many thousands of dollars in substantial and actual competition with the businesses conducted by the National Banks located in the City of Montgomery, Montgomery County, Alabama, and the plaintiff

bank, which were exempted by the laws of Alabama from any tax upon their shares of capital stock or capital or left by the laws of Alabama wholly untaxed for ad valorem tax purposes with respect to their shares of capital stock, or were taxed at a lesser rate, in the sense of burden imposed, than the said shares of plaintiff or the shares of National Banks. During said period, there were insurance companies organized under the laws of Alabama and doing business in said City of Montgomery, Alabama, lending money on mortgages and purchasing state, municipal and other bonds in substantially the same manner as state and national banks located in Alabama, to the extent of many thousands of dollars, which were entitled to certain credits or exemptions in computation of the tax assessed upon their shares of capital stock or capital by the laws of the State of Alabama for ad valorem tax purposes, which credits or exemptions were not accorded under the laws of Alabama in computation of assessments on the shares of capital stock or capital of said National Banks and State Banks, including said shares of plaintiff bank. During the said period, in the conduct of plaintiff's business and in the conduct of the businesses of the National Banks located in said City and county and in lending money and purchasing notes, bonds, stocks and securities, plaintiff bank and said National Banks found in actual and substantial competition with them other individuals, persons, firms, associations and corporations engaged in like business or businesses and using moneyed capital therein to the extent of many thousands of dollars, which moneyed capital was not assessed or taxed for ad valorem taxes under the laws of Alabama and was either expressly exempted by said laws or left untaxed by said laws, or was taxed, at a lesser rate, in the sense of burden imposed, than the said shares of plaintiff or the shares of National Banks. During said period, a large amount of property of like character to that of the shares of capital stock and capital of plaintiff bank and said National Banks, in the form of money loaned, bills and notes discounted, securities bought and sold, by a large number of persons, firms and corporations engaged in like businesses to the businesses of said National Banks and State Banks, including plaintiff bank, to the extent of many thousands of dollars in actual and substantial competition with the business of said National Banks and plain-

tiff bank was not assessed for taxation but was exempted [fol. 54] by the laws of Alabama from ad valorem taxation or left untaxed by said laws, or was taxed at a lesser rate, in the sense of burden imposed, than the said shares of plaintiff or the shares of National Banks."

* * * * * * *

"Eleventh. That many of the corporations hereinabove mentioned are corporations organized and existing under the laws of Alabama and that during the times herein mentioned thousands of the shares of the capital stocks of said Alabama corporations were held and owned by the shareholders thereof."

Further stipulations disclose, that National banks in certain cities in Alabama have, because of this discrimination in taxing moneyed capital, refused to pay the ad valorem tax assessed against their shareholders, and test cases have been finally adjudicated by the Federal Courts in Alabama in their favor; that the Tax Collector of Montgomery County has not collected, nor is he making any effort to collect, ad valorem taxes assessed against the shareholders of the National banks in the City of Montgomery.

This is pursuant to an opinion of the Attorney General rendered upon a request from the Tax Collector setting forth the untaxed competitive moneyed capital in substance as here agreed.

The appellant does not here contend that shares of National banks are now subject to the ad valorem tax in question. We deem it important, however, to determine the question on the law and facts without regard to the views of the Attorney General.

Without considering whether all the corporations and associations mentioned in the agreed facts as employing moneyed capital in the loan and investment features of [fol. 55] their businesses in competition with banks are tax free, or taxed at a lower rate in the sense of the burden imposed, we must hold that the record discloses substantial competition with both State and National banks on the part of corporations engaged in the loan and investment business, using and employing moneyed capital in such competitive business, which corporations or associations are

subject to the laws of Alabama relating to taxation of shares of stock as the property of shareholders, and which, by our laws, are wholly exempt, or taxed at lower rates, in the sense of the tax burden imposed. As a result, we must further hold, following the decisions of the Supreme Court of the United States as final authority, the shares of National banks in Montgomery are no longer subject to ad valorem taxation.—Ward v. First Nat. Bank of Hartford, MS; First National Bank v. Anderson, 269 U. S. 341, 70 L. Ed. 295; Mercantile Bank v. New York, 121 U. S. 138, 30 L. Ed. 895, 7 Sup. Ct. Rep. 826; New York v. Weaver, 100 U. S. 539, 25 L. Ed. 705; First Nat. Bank v. Chapman, 173 U. S. 205, 43 L. Ed. 669, 19 Sup. Ct. Rep. 205; First Nat. Bank v. Hartford, 273 U. S. 548, 71 L. Ed. 767; Minnesota v. First National Bank, 273 U. S. 561; 71 L. Ed. 774; Iowa-Des Moines Nat. Bank v. Bennett, (U. S.) 76 L. Ed. 164; Georgetown Nat. Bank v. McFarland, 273 U. S. 658, 71 L. Ed. 779, 47 Sup. Ct. Rep. 467.

We are brought, therefore, face to face with this proposition: When, by our system of laws, State and Federal, shares of National banks are taken without the body of taxable property on an ad valorem basis, are the shares of State banks still taxable on such basis?

The case of State Bank v. Board of Revenue, supra, answers this question in the negative.

The great Jurist who wrote that opinion, with his associates, as appears from decisions above reviewed, had [fol. 56] considered these questions for many years.

Following that decision our tax structure was so remodeled that for thirty years shares of stock in both State and National banks were effectively taxed, and, along with the shares in other corporations, contributed to the maintenance of the government whose benefits they shared. The basis of the decision was the application of the uniformity clauses of our own Constitution.

While recognizing the rule often declared that these provisions do not require that all property be taxed, do not inhibit exemptions, nor the selection of the subjects of taxations within the bounds declared, still two definite and unequivocal announcements are made as governing the taxation of the shares of State and National banks, viz: (1) "If a tax is imposed on any species of property, all prop-

erty belonging to that species must be taxed at the same rate." (2) "Bank shares in a National bank and bank shares in a State bank, belong to one species of moneyed capital. Any attempt to draw a distinction between them, as subjects of taxation, would be futile."

It is suggested the case then being considered involved a statute taxing shares in State banks and shares in National banks on a different basis of value; that the exclusion of National bank shares under our present laws is due to the Federal law, and State is still free to tax the shares in banking corporations of its own creation. In last analysis this contention means no more than that shares in State banks and in National banks are not of the same class or [fol. 57] species of property within the meaning of our Constitution. This, in direct contradiction to the decision we are considering. If the state of the Federal law constitutes the one a different class, the court would have then said State banks have no concern with the taxation of National banks, the shares of the latter may be wholly exempt, and hence the imposition of a lesser tax is a matter of which State banks cannot complain.

Certainly "all property" of the same species cannot be taxed at the same rate, if a portion of such species is taxed on an ad valorem basis and the other is not taxed at all. Exemption and selection cannot strike down entirely the uniformity provisions of our Constitution.

It cannot be assumed that Chief Justice Stone did not take account of the fact that the restrictions upon the taxation of National bank shares were imposed by the Federal statute. He expressly refers to Section 5219, in force then as now, as enabling in character. While this is well recognized, still in fact, and as Judge Stone evidently viewed it, the Federal law recognizes shares in National banks as the rightful subject of State taxation.

They are private property enjoying all the benefits of State government as other property having a tax situs in the State. Of right, they should share in the support of that government. Congress, in recognition of this fact, says: "Nothing in this act" shall prevent such taxation, but it must be done without tax discrimination in favor of other moneyed capital. It is such discrimination, as con- [fol. 58] strued by Federal decisions, which has excluded

shares in National banks from the body of taxable property in the State. True, our legislature has manifested no purpose to tax shares in State banks and exempt shares in National banks. The statute purports to put them on the same footing, but the failure to tax other moneyed capital at the same rate, that is to say, impose a tax in some form substantially equal in the sense of the burden imposed, having regard to all the incidents and conditions which may rightfully enter into a scheme of taxation, has worked a release of National bank shares from ad valorem taxes.

We do not hesitate to say there is no semblance of justice in taxing the shares of State banks and excluding those of National banks. Such status is calculated to bring on a form of antagonism and rivalry between the two systems which may work injury to both.

We see no good reason to depart from the clearly expressed views of Judge Stone that both must be taxed alike or neither can be. Sections 211 and 217 of our Constitution, aimed at equality and justice in taxation, are to little effect, if one be taxed on an ad valorem basis and the other wholly relieved. This holding is forfeited by similar holdings in other States where the like question has arisen.—Voran v. Wright, (Kan.) 284 Pac. 807; Central National Bank v. Sutherland, (Neb.) 202 N. W. 428; Commercial State Bank v. Wilson, (S. D.) 220 N. W. 152; Security Savings Bank v. Board of Review, (Ia.) 178 N. W. 562.

The principle that where one species of property is taxed all property of that species must be taxed, and taxed at the same rate, is recognized by many decisions of our court.—[fol. 59] Western Union Telegraph Co. v. State Board of Assessment, 80 Ala. 280; Hooper v. The State, 141 Ala. 111; The State v. Alabama Fuel & Iron Co., 188 Ala. 487.

Strong insistence is made that such a rule puts the State in leading strings, subjects it to Federal power in shaping its own tax structure. Appellant relies upon our line of cases recognizing the right of the State to make classification for purposes of excise taxation, and to make exemptions and selections in matter of ad valorem taxes; calls attention to our tax upon the registration of mortgages and exemption of such loans from ad valorem taxes, treated in The State v. Alabama Fuel & Iron Co., supra; calls attention also to exemption of foreign securities upon payment

of a recording tax, upheld in Lee v. State Tax Commission, 219 Ala. 513, 123 So. 6.

The power of Congress to impose such restriction as may be deemed proper to prevent tax discrimination against shares in National banks is undoubted.

While our government is dual in character, consisting of Federal Laws and State Laws, within the scope of their respective powers, it is one government. The Federal law is the law of Alabama, just as the Acts of its Legislature. As for Section 5219 of Revised Statutes, the situation is not materially different from like provisions inserted in our own Constitution.

The insistence that the State's rightful power to shape its own taxing policies should be zealously guarded is of real moment.

[fol. 60] The co-operation of the Congress to that end is but to recognize the genius of our institutions. In general it may be said the decisions of the United States Supreme Court, in recognition of this vital interest of the States, construe their tax laws liberally when assailed as invasive of some provision of the Federal Constitution. See review of authorities in our recent case, State v. Anglo-Chilean Nitrate Sales Corporation, MS; also Ohio Oil Co. v. Conway, 281 U. S. 146.

If Section 5219, as now amended and as construed by the United States Supreme Court is not properly framed in this regard, the remedy lies with Congress. As clearly shown in State Bank v. Board of Revenue, supra, the right of State banks to have their shares placed in the same class or species as the shares of National banks is by force of our own Constitution, aimed at the same general principle of equality in tax burden as in the Federal statute.

Our State tax laws have in the main exempted moneyed capital, and shares of corporations operating on moneyed capital, from ad valorem taxation. That this class of property should bear its due share of the burdens of taxation would not seem to be matter of debate.

What is its due share, all things considered, and the manner of its imposition, are legislative problems.

Whatever aid we may render by a pertinent discussion of the principles involved, we conceive it our duty to give.

Assuming, then, that the legislative policy of retaining the shares of both State banks and National banks as tax-

[fol. 61] able property on an ad valorem basis in Alabama is to be adhered to, we here set out, for easy reference, Section 5219 of Revised Statutes as now amended by Acts of 1923 and 1926 (United States Statutes as Large, Part 2, Vol. 44, page 223) as follows:

" 'Sec. 5219. The legislature of each State may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several States may (1) tax said shares, or (2) include dividends derived therefrom in the taxable income of an owner or holder thereof, or (3) tax such associations on their net income, or (4) according to or measured by their net income, provided the following conditions are complied with:

" '1. (a) The imposition by any State of any one of the above four forms of taxation shall be in lieu of the others, except as hereinafter provided in subdivision (c) of this clause.

" '(b) In the case of a tax on said shares the tax imposed shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State coming into competition with the business of national banks: Provided, That bonds, notes, or other evidences of indebtedness in the hands of individual citizens not employed or engaged in the banking or investment business and representing merely personal investments not made in competition with such business, shall not be deemed moneyed capital within the meaning of this section.

" '(c) In case of a tax on or according to or measured by the net income of an association, the taxing State may, except in case of a tax on net income, include the entire net income received from all sources, but the rates shall not be higher than the rate assessed upon other financial corporations nor higher than the highest of the rates assessed by the taxing State upon mercantile, manufacturing, and business corporations doing business within its limits: Provided, That a State which imposes a tax on or according to or measured by the net income of, or a franchise or excise tax on, financial, mercantile, manufacturing, and business corporations organized under its own laws or laws of other

States and also imposes a tax upon the income of individuals, may include in such individual income dividends from national banking associations located within the State on condition that it also includes dividends from domestic corporations and may likewise include dividends from national banking associations located without the State on condition that it also includes dividends from foreign corporations, but at no higher rate than is imposed on dividends from such other corporations.

[fol. 62] "'(d) In case the dividends derived from the said shares are taxed, the tax shall not be at a greater rate than is assessed upon the net income from other moneyed capital.

"'2. The shares of any national banking association owned by non-residents of any State, shall be taxed by the taxing district or by the State where the association is located and not elsewhere; and such association shall make return of such shares and pay the tax thereon as agent of such non-resident shareholders.

"'3. Nothing herein shall be construed to exempt the real property of associations from taxation in any State or in any subdivision thereof, to the same extent, according to its value, as other real property is taxed.

"'4. The provisions of section 5219 of the Revised Statutes of the United States as heretofore in force shall not prevent the legalizing, ratifying, or confirming by the States of any tax heretofore paid, levied, or assessed upon the shares of national banks, or the collecting thereof, to the extent that such tax would be valid under said section'."

Since this court has held income to be property within the uniformity provisions of our Constitution, a tax on income except on an ad valorem basis at the same rate as other property, would call for an amendment to our State Constitution.

To meet the conditions of the Federal statute as to taxing shares of National banks, on an ad valorem basis, a like tax on the shares of corporations engaged in a competitive loan and investment business, is fully recognized by decision as well as indicated by the statute.

But this method of taxing moneyed capital of the individual employed in competition with National banks, or

where the loan and investment business of a corporation is incidental to and in connection with another main business, may not be desirable nor just.

[fol. 63] In this connection, we observe that the equality called for in the Federal statute does not require that every loan or investment of moneyed capital be taxed on an ad valorem basis. The Federal decisions draw a definite distinction between the capital and loans of a National bank and the shares of its capital stock. The value of the shares depends normally on the results of the business as a whole, the dividend or income it yields.

There would seem to be a reasonable workable relation between net income and the value of the property yielding the income that would afford a basis for taxation at substantially the same rate in the sense of burden imposed.

This court has in many well known decisions recognized in principle the legislative power to impose excise or privilege taxes on the basis of the value of such privilege, as measured by the volume or income from the business.

We see no reason, therefore, why a system of taxing moneyed capital may not be worked out on these lines, conforming to all the requirements of Federal law and our State Constitution in the matter of substantial equality. Surely there is crying need for a solution of these matters.

As matters now stand, we must hold the shares in appellee, State Bank, not subject to ad valorem taxation. This conclusion is based solely on the exclusion of shares of National banks by discrimination in favor of other moneyed capital in disregard of the restrictions of the Federal law.

Anderson, C. J., and Foster, J., concur in the foregoing dissent.

[fol. 64] Clerk's certificate to foregoing transcript omitted in printing.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 17, 1932

The petition herein for a writ of certiorari to the Supreme Court of the State of Alabama is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 346

UNION BANK & TRUST COMPANY, PETITIONER,

vs.

R. C. PHELPS, INDIVIDUALLY, AND AS TAX COLLECTOR OF MONTGOMERY COUNTY, ALABAMA.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALABAMA AND BRIEF IN SUPPORT THEREOF.

WILLIAM B. WHITE,
Counsel for Petitioner.

JOHN S. COLEMAN,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 346

UNION BANK & TRUST COMPANY, PETITIONER,

vs.

R. C. PHELPS, INDIVIDUALLY, AND AS TAX COLLECTOR OF MONTGOMERY COUNTY, ALABAMA, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Supreme Court of the United States:

The petitioner, Union Bank & Trust Company, respectfully states and shows to this Honorable Court:

Summary Statement of the Matter Involved.

The petitioner, a State bank organized under the laws of Alabama relating to banking institutions, was at all times herein referred to engaged in the business of banking in the city of Montgomery, Alabama. It brought this action at law in the Circuit Court of Montgomery County, Alabama, against R. C. Phelps, indi-

vidually, and as tax collector of Montgomery County, Alabama, to recover from him Twenty-five Hundred Twenty-one and 69/100 Dollars ($2,521.69), taxes and interest erroneously and illegally collected and exacted from petitioner and paid by it under protest, on account of an *ad valorem* tax assessment for state and county purposes against the shares of the capital stock of petitioner for the tax year beginning October 1, 1930, and ending September 30, 1931. The assessment was made as provided by Section 6 of the General Revenue Act of Alabama of 1923 (General Acts of Alabama of 1923, page 152, Section 6) (Appendix).

The action was in the form authorized in Alabama. *Ward* v. *First National Bank of Hartford,* 142 Southern 93, not yet officially reported.

The basis of the action as set out in the special counts of the complaint (R. 1-16) was:

(1) The State of Alabama had, by statute adopted in 1927 (General Acts of Alabama of 1927, page 139, Section 25), exempted from *ad valorem* taxation, or had left untaxed, shares of certain corporations engaged in actual and substantial competition with petitioner. A copy of the statute is set out in full in the appendix, the exemption provisions being as follows:

> "Every share of any domestic corporation (except banks or banking associations and building and loan associations, and mortgage companies or corporations making loans on real estate or purchasing mortgages or mortgage notes on real estate and industrial loan companies or corporations), shall be assessed and taxes thereon collected in the county wherein

such corporation has its home or chief office in the State, and shall be assessed at sixty per cent of its fair and reasonable market value to the person in whose name such shares stand on the books of the corporation and not to the corporation. * * * Provided, however, that the provisions of this act shall not apply to the shares of stock of domestic or foreign mortgage companies or corporations whose chief business is making loans on real estate or purchasing mortgages and mortgage notes on real estate; nor shall this act apply to the shares of domestic or foreign industrial loan companies or corporations, it being hereby expressly enacted that all shares of stock of such domestic and foreign mortgage companies or corporations and domestic and foreign industrial loan companies or corporations, shall be exempted from assessment and the payment of ad valorem taxes."

The State of Alabama had also exempted from taxation all mortgages, together with the notes, debts and credits secured thereby, on real and personal property situated in the State, provided such mortgages had been filed for record and the privilege tax paid thereon (Code of Alabama of 1923, Section 3022) (Appendix). The privilege tax referred to was at the rate of fifteen cents (15¢) per hundred dollars, or fraction thereof, of indebtedness secured by such mortgages (General Acts of Alabama of 1923, page 152, Section 4½).

By reason of the exemption of the shares of said corporations, and the exemption of said monied capital, competing with petitioner, Section 6 of the Revenue Act of 1923 imposing a tax on shares of national and State banks was void and unconstitutional in so far

as it applied to the shares of petitioner, because violative of the equality clause of the Fourteenth Amendment to the United States Constitution and of Section 217 of the Alabama Constitution, which provides that the property of private corporations, associations and individuals of the State shall forever be taxed at the same rate.

(2) Section 6 of the Revenue Act of 1923 was ineffective in so far as it attempted to tax shares of national banks located in Montgomery, Alabama, because other monied capital in the hands of individual citizens of the State coming into competition with such national banks within the meaning of Section 5219 Revised Statutes of the United States was expressly exempted from taxation or was untaxed. The Attorney General of Alabama had rendered an opinion to respondent that the shares of such national banks could not be taxed (R. 12-15) and no efforts or attempts were being made or were intended to be made to collect any tax on such shares, and said national banks were engaged in actual and substantial competition with petitioner; as the state had failed to levy any valid and legal tax on the shares of such national banks Section 6 of said statute was ineffective, discriminative and void in so far as it attempted to tax the shares of petitioner, because violative of Section 1 of the Fourteenth Amendment to the United States Constitution and of Section 217 of the Alabama Constitution.

(3) It had been judicially determined by the United States District Courts in Alabama that the shares of

national banks located in certain cities in Alabama, viz., Dothan, Selma and Troy, Alabama, could not be legally taxed under Section 6 of the 1923 statute, for the reason that monied capital in the hands of citizens of Alabama within the meaning of Section 5219 Revised Statutes of the United States in substantial and actual competition with the business of national banks located in said cities was untaxed or exempted from taxation and that the failure of the state effectively to tax national bank shares and the failure to tax, or the exemption from taxation of, shares of other corporations competing with petitioner and the exemption from taxation, or failure to tax, monied capital in competition with petitioner rendered ineffective and void the tax assessed under Section 6 of the 1923 Act against the shares of petitioner, because the assessment and statute were violative of Section 1 of the Fourteenth Amendment to the Federal Constitution and also Section 217 of the Alabama Constitution.

Petitioner's complaint also contained two common counts (R. 11). Under the Alabama practice, if petitioner was entitled to recover at all, it could recover under such counts, regardless of the sufficiency of the special counts. *Ward* v. *First National Bank of Hartford, supra.* The written protest filed by petitioner with respondent denied the validity of the assessment, or any part thereof, and also contained a denial of the right of the state and the county to make the assessment, and asserted that the collection of the tax was erroneously and illegally made and exacted (R. 16). Both the Circuit Court

and the Alabama Supreme Court apparently considered that the assessment was made under Section 6 of the 1923 Act. It was the position of petitioner that if there was any other statute under which the tax might have been claimed to have been levied, the tax and the assessment of same was illegal and void because of the exemption or failure to tax the shares of competing corporations which were in the same class as its shares, and because of the exemption from taxation, or the failure to tax, monied capital engaged in actual and substantial competition with petitioner.

Respondent, by way of answer, pled defenses (R. 22-23) which may be summarized as follows:

1. Not indebted in the form and manner alleged.

2. No appeal was taken from the assessment, and, as no protest was made until the taxes were paid, the protest was too late.

3. That the arrangement of national and state banks in one section as appeared in Section 6 of the 1923 Act was not a classification for taxation purposes but only a method of assessment. Respondent admitted that shares of certain national banks, presumably competing with petitioner, escaped share taxation, but this was because of the limitations placed by Congress upon the state's power to tax national bank shares. The failure of the state effectively to tax national bank shares did not relieve the petitioner from liability for the tax on its shares.

4. The Legislature had the right to select its subjects of taxation and to exempt such as it saw fit, and

the exemption of shares of stock of the corporations named in petitioner's complaint was not arbitrary but a legitimate prerogative of the state and did not violate any constitutional provision.

Upon the trial of the action all of the facts were agreed upon by the parties, and may be briefly summarized as follows:

Plaintiff, an Alabama corporation having its principal and only office in Montgomery, Alabama, was engaged in a general commercial and savings bank business. It accepted deposits, made loans, with real and personal property as security, and loans without security, and purchased and dealt in municipal and other bonds and securities (R. 28).

During the year 1930, and continuously thereafter, there were building and loan associations, mortgage corporations, industrial loan corporations, insurance companies and industrial banks located in Montgomery, Alabama, and elsewehere in the state, which loaned money and otherwise engaged in substantial and actual competition with petitioner, and with two national banks located in Montgomery, Alabama, the capital and shares of which were either wholly exempted from taxation, or were taxed at a lesser rate than the shares of petitioner and the shares of the national banks and during said time there were individuals, firms and partnerships who employed monied capital in the business of loaning money and otherwise engaging in substantial and actual competition with petitioner, and such monied capital was untaxed or taxed at a lesser rate than the shares of petitioner and the shares of the national banks (R. 31).

The national banks located in Montgomery, Alabama, were engaged in substantial and actual competition with petitioner (R. 33). A copy of the opinion of the Attorney General holding that these shares were not liable for *ad valorem* taxes was introduced (R. 12-15), and it was admitted no taxes had been collected on account of such shares during the tax year 1930-1931, and that no effort to collect same had been made, and that respondent did not intend to collect same (R. 34).

The decisions of the United States District Court in Alabama holding that the shares of national banks located in Dothan, Troy and Selma, Alabama, respectively, were not liable for *ad valorem* taxes had not been appealed from. The time had expired in two cases and no appeal was intended to be taken in any of the cases (R. 33).

Petitioner paid the taxes under duress and under protest and respondent had the amount so paid in his custody and possession (R. 15-20, 34).

On the trial in the Circuit Court judgment was rendered in favor of petitioner for the full amount sued for (R. 27). Respondent perfected an appeal to the Supreme Court of Alabama, which Court on May 19, 1932, reversed the judgment of the lower court and remanded the cause (R. 38). The decision was by a divided Bench, four of the Associate Justices concurring, and the Chief Justice and two Associate Justices dissenting. The opinion and dissenting opinion appear in the record at pages 39 to 56. The case has not yet been officially reported, but is reported in 142 Southern Reporter 552.

Petitioner, on June 1st, 1932, within the time allowed, filed an application for rehearing (R. 38). The application for rehearing was disallowed on June 16, 1932, and the former judgment of reversal and remandment was changed to a judgment reversing the judgment of the Circuit Court and rendering judgment together with costs in favor of respondent (R. 38).

Reasons Relied on for Allowance of the Writ.

1. This is a cause wherein a final judgment has been rendered or passed by the Supreme Court of Alabama, which is the highest court of the state in which a decision could be had, by which the validity of a statute of Alabama is drawn in question on the ground of its being repugnant to Section 1 of the Fourteenth Amendment to the Constitution of the United States.

2. This is cause wherein a final judgment has been rendered or passed by the Supreme Court of Alabama, which is the highest court of the state in which a decision could be had, wherein a right or privilege is specially set up and claimed by the petitioner under the Fourteenth Amendment to the Constitution of the United States and the judgment erroneously denies the petitioner such right or privilege.

3. The Supreme Court of the State of Alabama, being the highest Court of said State in which a decision could be had, has decided a federal question of substance in a way probably not in accord with applicable decisions of this Court, including the cases of *Central State Bank* v. *Bennett,* 284 U. S. 239; *Cumberland Coal Company* v. *Board of Revision of Tax Assessments in Greene County, Pennsylvania,* 284 U.

S. 23; *Raymond* v. *Chicago Union Traction Company*, 207 U. S. 20; *Sioux City Bridge Company* v. *Dakota County*, 260 U. S. 441; *Sunday Lake Iron Company* v. *Township of Wakefield*, 247 U. S. 350; *First National Bank of Hartford* v. *Hartford*, 273 U. S. 548; *Minnesota* v. *First National Bank of St. Paul*, 273 U. S. 561; *Cummings* v. *Merchants National Bank*, 101 U. S. 151; *Carpenter* v. *Shaw*, 280 U. S. 363; *Montana National Bank* v. *Yellowstone County*, 276 U. S. 499; *Ward* v. *Love County*, 253 U. S. 17.

4. The decision and judgment of the Supreme Court of Alabama, being the highest Court of the State in which a decision in this cause could be had, denies to petitioner the equal protection of the laws, contrary to the Fourteenth Amendment to the Constitution of the United States, in that it denies to petitioner the right to have its shares of stock treated for the purposes of taxation on the same basis as shares of other corporations engaged in actual and substantial competition with petitioner.

5. The decision and judgment of the Supreme Court of Alabama, being the highest Court in the State in which a decision in this cause could be had, has denied to petitioner the equal protection of the laws, contrary to the Fourteenth Amendment to the Constitution of the United States, in that it erroneously denied to petitioner the right to be accorded the same privilege and treatment that is accorded to individuals, partnerships and corporations engaged in actual and substantial competiton with petitioner.

A certified copy of the entire record in this cause, including the record and proceedings and papers in the

Supreme Court of the State of Alabama, is herewith furnished and accompanies this petition, in compliance with Rule 38 of the rules of this Court; also a supporting brief of petitioner is hereto attached.

WHEREFORE your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of Alabama, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete description of the record and all the proceedings in the case numbered and entitled on its Docket 3, Division 12, R. C. Phelps, Individually and as Tax Collector of Montgomery County, Alabama, appellant, *v.* Union Bank & Trust Company, appellee, and that the same decree and judgment of the Supreme Court of Alabama may be reversed by this Honorable Court and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just. And your petitioner will ever pray.

UNION BANK & TRUST COMPANY,
By WILLIAM B. WHITE,
Counsel for Petitioner.

JOHN S. COLEMAN,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 346

UNION BANK & TRUST COMPANY, PETITIONER,

vs.

R. C. PHELPS, INDIVIDUALLY, AND AS TAX COLLECTOR OF MONTGOMERY COUNTY, ALABAMA, RESPONDENT

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion of the Court Below.

The opinion of the Supreme Court of Alabama has not been officially reported, but is reported in 142 Southern Reporter 552, and appears in the record, beginning on page 39.

II.

Jurisdiction.

1. The jurisdiction of this court is sustained by Judicial Code, Section 237, as amended by the Act of February 13, 1925. 43 Stat. 938.

2. This case involves the validity of an assessment against and the collection of the tax upon the shares of stock of petitioner and the validity of the statute which authorized the assessment and collection of the tax (General Acts of Alabama of 1923, page 152, Section 6) (Appendix). The statute provided that every share of every incorporated bank or banking association incorporated under the laws of Alabama or any other state or of the United States should be assessed for taxation where the bank was located at the rate of 60% of its fair and reasonable market value. Each bank was required to make an annual return, furnishing information as to the value of its shares and certain other information for the purpose of assisting the officials in making the assessment. The value of the shares was fixed and, after deducting the value of the real and personal tangible property listed for taxation, sixty per cent of the residue value divided by the whole number of shares constituted the assessed value of each share. The bank was required to pay the tax of the shareholders.

The invalidity of the tax against the shares of petitioner came about by reason of the state exempting or failing to tax shares of building and loan associations, mortgage companies making loans on real estate or purchasing mortgages or mortgage notes on real estate, and industrial loan companies engaged in substantial and actual competition with petitioner (General Acts of Alabama of 1927, page 139, Section 25) (Appendix) and the exemption from taxation or the failure to tax monied capital of individuals, firms and corporations in substantial and actual competition with

petitioner (Code of Alabama of 1923, Section 3022) (Appendix) and by reason of the failure of the state to effectively and legally tax shares of national banks engaged in substantial and actual competition with petitioner. The opinion of the Supreme Court of Alabama recognized that the effort to tax shares of competing national banks was abortive (R. 40).

3. The date of the judgment sought to be reviewed is June 16, 1932 (R. 38).

4. There has been stated in the preceding petition under "Summary Statement of the Matter Involved," pages 1 to 6, and "Reasons Relied on for Allowance of the Writ," pages 9 and 10, the nature of the case and the rulings below, which were such as to bring the case within the jurisdictional provision relied on, and the same are hereby adopted and made a part of this brief.

Petitioner made the claim when it paid the tax to respondent (R. 16), also in its complaint filed in this cause (R. 5, 10), that the tax was levied, assessed and collected in violation of rights guaranteed to it under the Fourteenth Amendment to the Constitution of the United States. This claim was expressly considered and disallowed by the Supreme Court of Alabama (R. 41).

5. Cases believed to sustain the jurisdiction are *Central State Bank* v. *Bennett*, 284 U. S. 239; *Cumberland Coal Company* v. *Board of Revision of Tax Assessments in Greene County, Pennsylvania*, 284 U. S. 23; *Raymond* v. *Chicago Union Traction Company*, 207

U. S. 20; *Sioux City Bridge Company* v. *Dakota County,* 260 U. S. 441; *Sunday Lake Iron Company* v. *Wakefield Twp.,* 247 U. S. 350; *First National Bank of Hartford* v. *Hartford,* 273 U. S. 548; *Minnesota* v. *First National Bank of St. Paul,* 273 U. S. 561; *Cummings* v. *Merchants National Bank,* 101 U. S. 151; *Carpenter* v. *Shaw,* 280 U. S. 363; *Montana National Bank v. Yellowstone County,* 276 U. S. 499; *Ward* v. *Love County,* 253 U. S. 17.

III.

Statement of the Case.

This has already been stated in the preceding petition under "Summary Statement of the Matter Involved," pages 1 to 6, and in the statement of the facts set out in the petition, pages 7, 8 and 9, which are hereby adopted and made a part of this brief.

IV.

Assignments of Error Intended to be Urged.

The final decision and judgment of the Supreme Court of Alabama is erroneous in the following respects:

(*a*) It denies the petitioner the equal protection of the laws; contrary to the Fourteenth Amendment to the Constitution of the United States in, that, under the statutes of Alabama, shares of stock of corporations engaged in substantial and actual competition with petitioner are exempted from taxation, or are untaxed.

(*b*) It denies the petitioner the equal protection of the laws, contrary to the Fourteenth Amendment to the Constitution of the United States, in that under the statutes of Alabama monied capital in substantial and actual competition with petitioner is untaxed or expressly exempted from taxation.

(*c*) It denies the petitioner the equal protection of the laws, contrary to the Fourteenth Amendment to the Constitution of the United States, in that the State of Alabama has failed to levy a valid and legal tax on the shares of national banks engaged in substantial and actual competition with petitioner.

(*d*) In holding that there was no illegal or wrongful discrimination, contrary to the Fourteenth Amendment to the Constitution of the United States, by the State of Alabama in taxing shares of petitioner and exempting from taxation or failing to tax shares of corporations engaged in substantial and actual competition with petitioner.

(*e*) In holding that the taxing statutes of Alabama make no illegal discrimination, contrary to the Fourteenth Amendment to the Constitution of the United States, against petitioner.

(*f*) In holding that the State of Alabama could tax shares of petitioner and exempt from taxation or fail to tax shares of competing corporations and monied capital coming into competion with petitioner contrary to the equality clause of the Fourteenth Amendment to the Constitution of the United States.

(*g*) In holding that the taxes collected and exacted by respondent from petitioner were not illegally and erroneously collected under the statutes of Alabama contrary to the Fourteenth Amendment to the Constitution of the United States.

V.

Summary of Facts.

The material facts have been stated in the preceding petition, and are made a part of this brief (pages 7, 8 and 9).

There is no conflict in the facts, it being admitted that shares of building and loan associations, mortgage companies, industrial loan companies engaged in competition with petitioner are untaxed under the Alabama statutes and that monied capital of persons, firms and corporations competing with petitioner was untaxed. It was also shown that the Attorney General of Alabama had rendered an opinion to the effect that shares of national banks competing with petitioner were not liable for any tax. The Supreme Court of Alabama, in both the majority opinion (R. 40) and the minority opinion (R. 50) in this case, recognized the non-liability of the competing national banks in Montgomery, Alabama, for any tax on their shares.

Propositions of Law.

I.

A tax on shares of state banks and the exemption or failure to tax shares of competing national banks and

shares of other competing corporations and monied capital in competition with state banks denies to such banks the equal protection of the law, contrary to the equality clause of the Fourteenth Amendment to the United States Constitution:

Central State Bank v. *Bennett*, 284 U. S. 239;
Cumberland Coal Company v. *Board of Revision of Tax Assessments in Greene County, Pennsylvania*, 284, U. S. 23;
Raymond v. *Chicago Union Traction Company*, 207 U. S. 20;
Sioux City Bridge Company v. *Dakota County*, 260 U. S. 441;
Sunday Lake Iron Company v. *Wakefield Twp.*, 247 U. S. 350;
First National Bank of Hartford v. *Hartford*, 273 U. S. 548;
Minnesota v. *First National Bank of St. Paul*, 273 U. S. 561;
Cummings v. *Merchants National Bank*, 101 U. S. 151;
Carpenter v. *Shaw*, 280 U. S. 363;
Montana National Bank v. *Yellowstone County*, 276 U. S. 499;
Ward v. *Love County*, 253 U. S. 17;
F. S. Royster Guano Company v. *Virginia*, 253 U. S. 412;
Louisville Gas & Electric Company v. *Coleman*, 277 U. S. 32;
Airway Electric Appliance Corporation v. *Day*, 266 U. S. 71;
Schlesinger v. *Wisconsin*, 270 U. S. 230;

Quaker City Cab Company v. *Pennsylvania,* 277 U. S. 389;
Munn v. *Des Moines National Bank,* 18 Federal, Second Series 269.

II.

Shares of national and state banks are the same species of property for taxation purposes, and no discrimination can be made in favor of one and against the other. See cases cited under Proposition I above, and also the following state cases:

State Bank v. *Board of Review,* 91 Alabama 217;
Central National Bank v. *Sutherland,* 113 Neb. 126;
State Bank v. *Endres,* 109 Neb. 753;
Voran v. *Wright,* 129 Kansas 601;
Commercial State Bank v. *Wilson,* 53 South Dakota 82;
State v. *Mady,* 83 Montana 418;
Security Savings Bank v. *Board of Review,* 189 Iowa 463.

ARGUMENT.

In the case of *Central State Bank* v. *Bennett,* 284 U. S. 239, it was held that where state officials had collected taxes on state bank shares at a higher rate than was collected on other property of the same class, contrary to the Fourteenth Amendment, such taxes, to the extent that they were in excess of the rate collected on the other property, could be recovered by the complaining banks. In the opinion delivered by Mr. Justice Brandeis, it was stated:

> "It is assumed that there was such inequality of treatment as the Constitution prohibits."

Petitioner construes the opinion as a holding by this Court that there was a wrongful discrimination in contravention of the Fourteenth Amendment, as otherwise a refund of the excess taxes collected would not have been directed.

The only distinction in the case at Bar from the Central State Bank case seems to be that in the latter case the property of competitors was taxed at a lesser rate than were the shares of stock of the complaining State banks, whereas in the present case the property of the competitors with petitioner is not taxed at all. The distinction is one of degree of inequality and not one of principle. The discrimination is more unjust here because of the total exemption from taxation of the property of petitioner's competitors.

The Supreme Court of Alabama, in *State Bank* v. *Board of Review,* 91 Alabama 217, considered a State statute which allowed shareholders in national banks to deduct their indebtedness from the value of their shares in arriving at taxable values and accorded no similar privilege to shareholders in State banks. The statute was held discriminatory, and violative of the uniformity provisions of the Alabama Constitution. These uniformity provisions in the State Constitution as in the constitutions of other States from which authorities are cited are obviously closely analogous in purpose to the purpose and intent of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States. We quote from the opinion of the Court as follows:

"What we do decide is, that whenever the legislature levies a tax on property, the rate must be in exact proportion to the value of such property; and that if a tax is imposed on any species of property, all property belonging to that species must be taxed at the same rate, whether it belongs to an individual, an association of persons, or to a private corporation. We mean by this, not only that, in this regard, natural persons, individuals or companies stand on the same footing with private corporations, but also that each individual association, or private corporation, is, under our constitution, endowed with the same rights, and subject to the same burdens, as are enjoyed or suffered by every other natural person, association of persons, or private corporation.

"We need scarcely say that bank shares in a National bank, and bank shares in a State bank, belong to one species of moneyed capital. Any attempt to draw a distinction between them, as subjects of taxation, would be futile. In assessing the one, our statute allows a deduction of the taxpayer's indebtedness, and taxes the surplus. In assessing the other, it allows no such deduction. We hold that this is a violation of Section 6, Art. XI of Alabama's Constitution, and that the shareholders in State banks are entitled to the same deductions as the statute accords to the shareholders of National banks."

In the case at bar the Chief Justice and two Associate Justices who dissented from the majority were of the opinion that the holding in the State bank case controlled here, and that such holding should not be departed from (R. 52).

There, of course, may be discrimination violative of the equality and uniformity clauses of the State Constitution which does not offend the Fourteenth Amendment. However, it is respectfully submitted that upon comparing the facts in the State bank case, *supra*, with those here, the considerations which influenced the State court in declaring that State and national bank shares belong to one species of moneyed capital within the meaning of the State Constitution equally impel the conclusion that the shares of both State and national banks constitute one class of property within the meaning of the Fourteenth Amendment and that no discrimination can legally be made in favor of one and against the other. The reasoning and the substance of the holding in the majority opinion is contained in the following excerpts from the opinion:

> "Therefore, when the Legislature, in the exercise of the power delegated by the Federal statute efficaciously levies a tax on the stock of United States Banks, in conformity with the statute, such levy reflects the limitation embodied in the Constitution in respect to the levy on subjects of taxation within the inherent power of the State, and requires substantial uniformity. Such was the case dealt with in *State Bank* v. *Board of Revenue*, 91 Ala. 217.
>
> "But where, as in the case at bar, the attempted exercise of the delegated power of taxation under the Federal statute is abortive, there is no basis for applying the limitation embodied in Section 217 of the Constitution to taxes levied in the exercise of the State's inherent power on domestic bank stock; therefore, the plaintiff was not entitled to recover" (R. 40).

> "Like reasoning as outlined in this opinion leads to the conclusion that the State system of taxation here questioned violates no provision of the Fourteenth Amendment to the Constitution of the United States. *Ohio Oil Co.* v. *Conway*, 281 U. S. 146" (R. 41).

The distinction sought to be made by the majority of the court below was that where the State efficaciously levies a tax on national bank shares such levy reflects the limitations embodied in the State and Federal Constitutions and substantial uniformity is required but where the attempted exercise of the power is abortive there is no basis for applying the State or Federal Constitutional limitations and the tax does not fall as to State bank shares, although it is ineffective as to national bank shares (R. 40).

The effect of the majority opinion can only be this: If national bank shares are taxed at all, then, no matter how small the tax, State bank shares must be taxed on the same basis, because in that event shares of both institutions constitute one inseparable species for taxation purposes. But the majority in the case at Bar also say that the Legislature not having levied even a small tax on other moneyed capital, the tax falls as to national bank shares but stands as to State bank shares. This can only mean that the Legislature by its action in levying or not levying a tax on other moneyed capital can determine and decide when State and national bank shares are one and the same species of taxable property. It is earnestly submitted that such a result cannot be sound or sustained on any tenable ground. Shares of national and State banks are

or are not one and the same species, regardless of what action the Legislature may take with reference to the taxation of other forms of moneyed capital. The question of constitutional power to classify subjects of taxation is one that the Legislature cannot decide. If the shares of State and national banks are one species of taxable property within the meaning of the Fourteenth Amendment under any circumstance, they constitute the same species under all circumstances.

It is stated in the majority opinion that the power to tax stocks in banks of the United States is not an inherent power residing in the State but a power delegated by Congress (R. 39).

It is too well established to admit of argument at this stage that the Federal and not the State government is the government exercising limited, enumerated or delegated powers. The Tenth Amendment to the Federal Constitution was passed to put that question beyond any doubt.

Congress, therefore, as we conceive the situation, did not *delegate* the power to tax shares of national banks in the hands of individual citizens of the States, but merely consented to the withdrawal of any objection on the part of the government of the United States to the exercise of the power to tax such shares already inherent in the States, provided uniformity in taxation be preserved, finding by such consent that as a matter of fact if uniformity is so preserved no improper burden will be imposed upon the Federal agencies, the national banks.

Mr. Justice Van Devanter, in *First National Bank* v.

Anderson, 269 U. S. 341, 347, said, with reference to the power of the States to tax national bank shares:

> "National banks are not merely private moneyed institutions but agencies of the United States created under its laws to promote its fiscal policies; and hence the banks, their property, and their shares cannot be taxed under State authority except as Congress consents and then only in conformity with the restrictions attached to its consent. * * *"

The exact form of expression used by Mr. Justice Swayne in *Farmers & Merchants National Bank* v. *Dearing,* 91 U. S. 29, is:

> "* * * In the complex system of polity which obtains in this country, the powers of government may be divided in four classes:
>
> "Those which belong exclusively to the States;
>
> "Those which belong exclusively to the National Government;
>
> "Those which may be exercised concurrently and independently by both;
>
> "And those which may be exercised by the States, but only with the consent, express or implied, of Congress.
>
> "Whenever the will of the nation intervenes exclusively in this class of cases, the authority of the State retires and lies in abeyance until a proper occasion for its exercise shall recur. *Gilman* v. *Philadelphia,* 3 Wall. 713 (70 U. S. XVIII. 96); *Ex parte McNiel,* 13 Wall. 240 (80 U. S. XX, 625).
>
> "The power of the States to tax the existing national banks lies within the category last mentioned."

Other cases dealing with the power of the States to tax Federal agencies are *Union Pacific Railroad Company* v. *Peniston*, 18 Wall. 5, and *Thomson* v. *Union Pacific Railroad Company*, 9 Wall. 579.

It is respectfully submitted that the majority opinion of the court below is erroneous in holding that where a State taxes shares of national banks it does so under power delegated by Congress and not by virtue of the sovereign power inherent in the State.

It was contended on the hearing in the Supreme Court of Alabama that if the State in taxing State banks had to conform to the same system that it was required to follow with reference to national banks this would destroy the State's power of classification. This contention is forcibly answered by the opinion delivered by Chief Justice Callaway, of the Supreme Court of Montana, in *State* v. *Mady*, 83 Montana 418, as follows:

> "It is argued that by thus restricting the taxation of national bank shares Congress has restricted, and may destroy, the State's power to classify property for the purposes of taxation. In one view this is a potent argument, but upon mature consideration we do not think it controlling. That Congress may not interfere with the taxation of property which it is the exclusive right of the State to tax will not be questioned. The difficulty here arises chiefly upon the requirements of the State Constitution. It requires the taxation of all property not exempt, and that the tax must be uniform upon the same class of subjects. The congressional requirement we are considering is not incon-

sistent with our constitutional provision requiring uniformity. It is thus our own fundamental law, acting coordinately with the law of Congress, which compels the State to tax State as well as national bank shares upon the same basis. The classification law placing national bank stock in class 6 and money coming into competition with the business of national banks in class 5 contravenes the provisions of section 5219. To that extent the classification law was and is invalid; it is not lawful to tax national bank stock on the 40 per cent basis. Conceding that it is proper under the law to tax it on the 7 per cent basis, we find the law attempting to tax the State bank stock on the 40 per cent basis—property of exactly the same kind—a clear violation of the constitutional unformity requirement. The State does not abrogate any part of its taxing power because it yields to Congress with respect to the taxation of a species of property which it could not tax without the consent of Congress, when its own fundamental law compels it to tax similar property upon the same basis on which it taxes property subject to the restrictions of Congress."

Other State Supreme Courts have held to the same effect in the following cases:

State Bank v. *Board of Review, supra;*

State Bank v. *Endres,* 109 Neb. 753;

Central National Bank v. *Sutherland,* 113 Neb. 126;

Voran v. *Wright,* 129 Kansas 601;

Commercial State Bank v. *Wilson,* 53 South Dakota 82;

Security Savings Bank v. *Board of Review,* 189 Iowa 463.

See also *Munn* v. *Des Moines National Bank,* 18 Federal, Second Series, 269.

There can be no question but that there was discrimination by the State of Alabama in taxing the shares of petitioner and exempting or failing to tax the shares of competing national banks and shares of other competing corporations and monied capital engaged in substantial and actual competition with petitioner. Both the majority and minority opinions of the court below recognize that there is no semblance of justice in taxing the shares of State banks and excluding those of national banks. The sole question involved in this case is whether such discrimination is of the character prohibited by the Fourteenth Amendment. Under the rulings of this Court it is believed petitioner is denied rights guaranteed to it by the Fourteenth Amendment.

Mr. Justice McReynolds, in the opinion in *Sunday Lake Iron Company* v. *Township of Wakefield,* 247 U. S. 350, said:

> "The purpose of the equal protection clause of the 14th Amendment is to secure every person within the state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents."

Other cases decided by this Court which the petitioner deems as holding that the discrimination in this

case is of the character prohibited by the Fourteenth Amendment are cited under the first proposition of the heading "Propositions of Law," and we respectfully refer the court to those cases.

The majority opinion of the court below cites *Ohio Oil Company* v. *Conway,* 281 U. S. 146, as authority that petitioner's rights under the Fourteenth Amendment were not violated. In that case this Court considered a statute adopted by the State of Louisiana imposing a graduated excise severance tax on oils. Varying amounts of taxes were levied according to the gravity of each kind of oil, but as all oils of the same gravity were taxed alike, it was held that the statute did not violate the Fourteenth Amendment. We fail to perceive wherein that ruling militates in any way against petitioner's claim in the present case. The controlling principles in the case were clearly defined by Mr. Chief Justice Hughes, who delivered the opinion. We quote from the opinion as follows:

> "With all this freedom of action, there is a point beyond which the state can not go without violating the equal protection clause. The state may classify broadly the subjects of taxation, but in doing so it must proceed upon a rational basis. The state is not at liberty to resort to a classification that is palpably arbitrary. The rule is generally stated to be that the classification 'must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' "

The Federal question involved in this case is of importance to petitioner and to numerous other State banks in Alabama similarly situated. The question is also of importance, we think, to the State of Alabama.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers in order that the error committed by the Supreme Court of Alabama in rendering its decision and judgment may be corrected and that petitioner may have the benefit of the rights to which it is entitled under the laws and Constitution of the United States and that to such end a writ of certiorari should be granted and this Court should review the decision of the Supreme Court of Alabama and finally reverse it.

Respectfully submitted,

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JOHN S. COLEMAN,
Of Counsel for Petitioner.

APPENDIX.

The following are the Statutes of Alabama so far as material to this case:

General Acts of Alabama of 1923, p. 152, Sec. 6.

"*Taxation of Incorporated Banks.*—Every share of any incorporated bank or banking association incorporated under the laws of this State, or any other state, or of the United States, shall be assessed for taxation in the county, and in the city or town where such bank is located at sixty per cent of its fair and reasonable market value. For the purpose of determining the value of such shares, the president or managing officer of such bank, or banking association, shall make out and return under oath to the assessor of the county in which such bank is located, and to the State Tax Commission, a list showing the total number of shares of capital of such bank, the name and address of every shareholder, as far as known, the fair and reasonable market value of such shares and the par value thereof, what sales of stock have been made during the last twelve months, with the names of the sellers and buyers thereof, and the price paid for same, the annual dividends declared upon the stock for the last three years, the value of the shares as shown by the books of the bank by the last report of the officers to the shareholders, the amount of the surplus, and the amount of the undivided profits not included in the surplus, and such president or managing officer shall at the same time in the manner required by law, return to the assessor a statement of all real estate and improvements thereon, and furniture and fixtures, owned by the bank situ-

ated in this State and liable for taxation. The value of the shares of such bank for taxation shall be fixed by the Board of Review and said Board of Review in fixing such value shall deduct from the total of the shares the reasonable market value, of the real estate and improvements thereon, and the furniture and fixtures belonging to such bank and assessed for taxation, and sixty per cent of the residue after such deduction shall be the assessed value of such shares, and such residue divided by the whole number of shares, shall constitute the assessed value of each share for taxation. It is the intent and meaning of this section that the real estate of every bank shall be assessed against the bank as other real estate in this State is assessed to the owner thereof, and that such bank shall pay the taxes thereon, and that the shares shall be assessed for taxation against the shareholders at sixty per cent of their fair and reasonable market value, as above determined after deducting therefrom the reasonable market value of the real estate and improvements thereon, and furniture and fixtures of the bank and that the bank shall pay for the shareholders respectively the tax so assessed, against their shares. In arriving at the fair and reasonable market value of the shares, there must be considered everything which gives them value, such as franchise, capital and assets of the bank, the real and personal property, the reserve fund and surplus, the undivided profits not included in the surplus, and all other interests of the shareholders that would pass to a purchaser on a transfer of his stock, and except as herein expressly provided, no separate tax shall be levied upon these elements, of value or any of them. It shall be no ground

of objection to such assessment of shares that it is entered upon the assessment book in the corporate name of the bank."

General Acts of Alabama of 1923, p. 152, Sec. 7.

"*Reports Required of Banks.*—The reports required from banks by the preceding sections shall be made on blanks furnished by the State Tax Commission. The failure of any banks to make the report required herein for the assessment for ad valorem taxation by December 31st of the year for which the tax is to be assessed shall subject such bank to a penalty of five dollars per day for each day's delinquency, which penalty may be collected by suit in the name of the State in any court of competent jurisdiction in Montgomery county, Alabama."

General Acts of Alabama of 1923, p. 152, Sec. 5.

"*Taxation of Unincorporated Banks.*—Any unincorporated bank, private bank or institution doing a banking business that is not incorporated shall be assessed at sixty per cent of its fair and reasonable market value. For the purpose of aiding in determining the amount of such assessment, the owner, president, cashier or manager of such bank shall under oath file with the tax assessor a statement in duplicate, one of which shall be forwarded to the State Tax Commission at Montgomery, Alabama, showing the capital of such bank, its surplus, undivided profits not included in the surplus, and all real estate owned by said bank and situated in this State, with a description of the same and the value of such real estate and the name of the person or the names of the persons who own said

bank, what interest or interests in said bank have been sold during the past twelve months, the price of the same, the name of the sellers, and the purchasers, the annual dividends declared by such bank for the last three years and the amount of the capital, surplus and undivided profits not included in the surplus. The Board of Review or State Tax Commission may examine any person with reference to the matters mentioned in said affidavit, and from all sources of information herein provided for, and from all other information that may be obtained, the Board of Review shall determine the amount of such capital, surplus, undivided profits not included in the surplus, and the value of the real estate of such bank. From the amount of the sum of the capital, surplus and undivided profits not included in the surplus so determined, the Board of Review shall deduct the value of the real estate of said bank. The bank shall pay a tax on the real estate and on the residue of all of its capital as above determined."

General Acts of Alabama of 1927, p. 139, Sec. 25.

"*Taxation of Domestic Corporations Except Banks and Building and Loan Associations.*— Every share of any domestic corporation (except banks or banking associations and building and loan associations, and mortgage companies or corporations making loans on real estate or purchasing mortgages or mortgage notes on real estate and industrial loan companies or corporations), shall be assessed and the taxes thereon collected in the county wherein such corporation has its home or chief office in the State, and shall be assessed at sixty per cent of its fair and reasonable market value to the person

in whose name such shares stand on the books of the corporation and not to the corporation. The President or managing officer of every such corporation shall make out and return under oath to the tax assessor and to the State Tax Commission a list showing the total number of shares of capital stock of such corporation and the par value thereof, and the full name and residence of each stockholder, as far as known, the actual value thereof, the date of the last sale of shares of stock of such corporation, with the name of the seller and the purchaser and the price paid for the same, and the annual dividend declared on the stock of such corporation, for the last three years, and the value of the shares as shown by the books of the corporation, and by the last report of the officers to the shareholders, and the amount of the surplus, and the amount of the undivided profits not included in the surplus, and such other information as may be required by the State Tax Commission. There shall be attached to the copy of the return made to the State Tax Commission a balance sheet showing the condition of such corporation at the close of its fiscal period next preceding October first of the year for which the assessment is to be made. Such corporations shall at the same time make a tax return sworn to by its president or manager, to the State Tax Commission and to the County Tax Assessor, on a form prescribed by the State Tax Commission, of all taxable property, real and personal, situated in the State and owned by such corporation, and the State Tax Commission after passing on the value of the shares of the capital stock, shall deduct from the total value of such shares the reasonable market value of the real and per-

sonal property of the corporation, as shown to be by such tax return of the corporation, and sixty per cent of the residue of value remaining after such deduction shall be the assessed value of the whole of such shares, and such sixty per cent of the residue divided by the whole number of shares, shall constitute the value of each share for taxation. Provided, however, that if any property owned by a corporation, which property is subject to taxation in this State, is omitted from the tax return filed by the corporation, the same shall be assessed as an escape item or items of taxation in the same manner as escaped property of individuals is assessed and the value of such omitted property shall not be deducted from the value of the shares of stock of the corporation as assessed for taxation. The corporation shall pay for the shareholders the tax assessed against his shares, and the amount so paid for any shareholder shall be a lien on any interest which such shareholder may have in any property owned by the corporation. In arriving at the value of the shares of the stock of a corporation organized under the laws of Alabama for the purpose of conducting an insurance business, there shall be deducted from the value of such shares, in addition to the assessed value of its property, (the amount of its bonds of the State of Alabama, or bonds of any county or municipality thereof, and of the United States), held by such insurance corporation at the time of such assessment, which said bonds were held during all the six months preceding such assessment. If the aggregate value of shares does not exceed the aggregate value of the real and personal property of the corporation as returned for taxation, then no tax shall

be demanded or collected on the shares, and no other deduction shall be made from the aggregate amount or sum at which the real and personal property of the corporation is returned for taxation than is herein specifically provided for. Provided that any corporation within the provisions of this section shall be entitled, for the purpose of arriving at the value of shares for taxation, to have deducted from the value of its shares, as fixed by the State Tax Commission, the assessed value of property owned by such corporation in other states or in other counties of this State on the next preceding first of October. The State Tax Commission and the tax assessor shall have a right to demand and receive of said corporation a certified copy of the assessment of any property outside of the State of Alabama sought to be deducted as above provided. The State Tax Commission shall deliver said assessment to the tax assessor with its other assessments of property in the county and notice of such assessment shall be given as in other cases. It shall be no ground for objection to such assessment of shares that the same is entered upon the assessment books in the name of the corporation. Provided that no shareholder of any corporation which pays a tax on its franchise or intangible property shall be liable for the taxes specified in this section as to the same property. Provided, however, that the provisions of this Act, shall not apply to the shares of stock of domestic or foreign mortgage companies or corporations whose chief business is making loans on real estate, or purchasing mortgages and mortgage notes on real estate; nor shall this Act apply to the shares of domestic or foreign industrial loan companies or corpo-

rations, it being hereby expressly enacted that all shares of stock of such domestic and foreign mortgage companies or corporations and domestic and foreign industrial loan companies or corporations, shall be exempted from assessment and the payment of ad valorem taxes."

General Acts of Alabama of 1923, p. 152, Sec. 9.

"*Reports required on blanks furnished by State Tax Commission; penalty for failure to report.*—The reports required from corporations by the preceding sections shall be made on blanks furnished by the State Tax Commission. The failure of corporations to make reports required herein for the assessment for ad valorem taxation, by December 31st of the year for which the tax is to be assessed shall subject such corporation to a penalty of five dollars per day for each day's delinquency, which penalty may be collected by suit in the name of the State in any court of competent jurisdiction in Montgomery County, Alabama."

General Acts of Alabama of 1919, p. 282, Sec. 13.

"*State Tax Commission to furnish blanks; how paid for.*—That all blanks covering the assessment of corporations shall be furnished by the State Tax Commission, the payment for such blanks to be paid out of the general appropriation for public printing."

General Acts of Alabama of 1919, p. 282, Sec. 14.

"*List of shareholders not required if corporation agrees to pay tax for such shareholders.*—If a corporation or a bank by endorse-

ment on its tax assessment or otherwise in writing, shall agree to pay the taxes, if any, assessed on the shares for the shareholders, it need not file a list of such shareholders."

Section 3022 of the Code of Alabama of 1923.

"*Property and persons exempt.*—The following property and persons shall be exempt from ad valorem taxation and none other: (1) * * * all mortgages, together with the notes, debts, and credits secured thereby on real and personal property situated in this State, which mortgages have been filed for record and the privilege tax paid thereon; all money on deposit in any bank or banking institution in this State and all other solvent credits; * * *"

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CHARLES E

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 346

UNION BANK & TRUST COMPANY, Petitioner,

vs.

R. C. PHELPS, Individually and as Tax Collector of Montgomery County, Alabama, Respondent.

On Writ of Certiorari to the Supreme Court of the State of Alabama

BRIEF OF PETITIONER

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(37,043)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 346

UNION BANK & TRUST COMPANY, Petitioner,

vs.

R. C. PHELPS, Individually and as Tax Collector of Montgomery County, Alabama, Respondent.

On Writ of Certiorari to the Supreme Court of the State of Alabama

BRIEF OF PETITIONER

THE OPINION OF THE COURT BELOW

The decision of the Supreme Court of the State of Alabama was by a divided Bench and was rendered on May 19, 1932. An application for rehearing was denied on June 16, 1932. The majority opinion appears in the printed record at page 39 and the dissenting opinion at page 41. The case has not been officially reported, but appears in 142 Southern Reporter 552. Petition for writ

of certiorari was duly filed within the time provided by law and the writ was granted on October 17, 1932.

STATEMENT OF THE CASE

The petitioner, a state bank organized under the laws of Alabama relating to banking institutions, was at all times herein referred to engaged in the business of banking in the City of Montgomery, Alabama. It brought this action at law in the Circuit Court of Montgomery County, Alabama, against R. C. Phelps, individually, and as tax collector of Montgomery County, Alabama, to recover from him Twenty-five Hundred Twenty-one and 69/100 Dollars ($2521.69), taxes and interest erroneously and illegally collected and exacted from petitioner and paid by it under protest, on account of an ad valorem tax assessment for State and County purposes against the shares of the capital stock of petitioner for the tax year beginning October 1, 1930, and ending September 30, 1931. The assessment was made as provided by Section 6 of the General Revenue Act of Alabama of 1923 (General Acts of Alabama of 1923, page 152, Section 6) (Appendix).

The action was in the form authorized in Alabama. *Ward v. First National Bank of Hartford*, 142 Sou. 93, not yet officially reported.

The basis of the action as set out in the special counts of the complaint (R. 1-20) was:

(1) The State of Alabama had, by statute adopted in 1927 (General Acts of Alabama of 1927, page 139, Section 25), exempted from ad valorem taxation, or had left untaxed, shares of certain corporations which during the years 1930, 1931 and 1932 engaged in actual and substan-

tial competition with petitioner. A copy of the statute is set out in full in the appendix, the exemption provisions being as follows:

> "Every share of any domestic corporation (except banks or banking associations and building and loan associations, and mortgage companies or corporations making loans on real estate or purchasing mortgages or mortgage notes on real estate and industrial loan companies or corporations), shall be assessed and taxes thereon collected in the county wherein such corporation has its home or chief office in the State, and shall be assessed at sixty per cent of its fair and reasonable market value to the person in whose name such shares stand on the books of the corporation and not to the corporation. * * * Provided, however, that the provisions of this act shall not apply to the shares of stock of domestic or foreign mortgage companies or corporations whose chief business is making loans on real estate, or purchasing mortgages and mortgage notes on real estate; nor shall this act apply to the shares of domestic or foreign industrial loan companies or corporations, it being hereby expressly enacted that all shares of stock of such domestic and foreign mortgage companies or corporations and domestic and foreign industrial loan companies or corporations, shall be exempted from assessment and the payment of ad valorem taxes."

The State of Alabama had also exempted from taxation all mortgages, together with the notes, debts and credits secured thereby, on real and personal property situated in the State, provided such mortgages had been filed for record and the privilege tax paid thereon (Code of Alabama of 1923, Section 3022) (Appendix). The privilege tax referred to was at the rate of fifteen cents

(15¢) per hundred dollars, or fraction thereof, of indebtedness secured by such mortgages (General Acts of Alabama of 1923, page 152, Section 4½).

By reason of the exemption of the shares of said corporations, and the exemption of said monied capital, both of which during the years 1930, 1931 and 1932 existed in substantial amounts in actual competition with petitioner, Section 6 of the Revenue Act of 1923 imposing a tax on shares of national and state banks was void and unconstitutional insofar as it applied to the shares of petitioner, because violative of the equality clause of the Fourteenth Amendment to the United States Constitution and of Section 217 of the Alabama Constitution, which provides that the property of private corporations, associations and individuals of the State shall forever be taxed at the same rate.

(2) Section 6 of the Revenue Act of 1923 was ineffective insofar as it attempted to tax shares of national banks located in Montgomery, Alabama, because other monied capital in the hands of individual citizens of the State coming into competition with such national banks within the meaning of Section 5219 Revised Statutes of the United States was expressly exempted from taxation or was untaxed. The Attorney General of Alabama had rendered an opinion to respondent that the shares of such national banks could not be taxed (R. 12-15) and no efforts or attempts were being made or were intended to be made to collect any tax on such shares, and said national banks were engaged in actual and substantial competition with petitioner. As the State had failed to levy any valid and legal tax on the shares of such national banks, Section 6 of said statute was ineffective, discriminative and void insofar as it attempted to tax the shares of petitioner,

because violative of Section 1 of the Fourteenth Amendment to the United States Constitution and of Section 217 of the Alabama Constitution.

(3) It had been judicially determined by the United States District Courts in Alabama that the shares of national banks located in certain cities in Alabama, viz., Dothan, Selma and Troy, Alabama, could not be legally taxed under Section 6 of the 1923 Statute, for the reason that monied capital in the hands of citizens of Alabama within the meaning of Section 5219 Revised Statutes of the United States in substantial and actual competition with the business of national banks located in said cities was untaxed or exempted from taxation. The failure of the State effectively to tax national bank shares and the failure to tax, or the exemption from taxation of, shares of other corporations competing with petitioner and the exemption from taxation, or failure to tax, monied capital in competition with petitioner rendered ineffective and void the tax assessed under Section 6 of the 1923 Act against the shares of petitioner, because the assessment and statute were violative of Section 1 of the Fourteenth Amendment to the Federal Constitution and also Section 217 of the Alabama Constitution.

Petitioner's complaint also contained two common counts. (R. 11) Under the Alabama practice, if petitioner was entitled to recover at all, it could recover under such counts, regardless of the sufficiency of the special counts.

Ward v. First National Bank of Hartford, supra.

The written protest filed by petitioner with respondent denied the validity of the assessment, or any part thereof, and also contained a denial of the right of the State and

the County to make the assessment, and asserted that the collection of the tax was erroneously and illegally made and exacted. (R. 16)

Both the Circuit Court and the Alabama Supreme Court apparently considered that the assessment was made under Section 6 of the 1923 Act. It was the position of petitioner that if there was any other statute under which the tax might have been claimed to have been levied, the tax and the assessment of same was illegal and void because of the exemption or failure to tax the shares of competing corporations which were in the same class as its shares, and because of the exemption from taxation, or the failure to tax, monied capital engaged in actual and substantial competition with petitioner.

Respondent, by way of answer, pled defenses (R. 22-23) which may be summarized as follows:

1. Not indebted in the form and manner alleged.

2. No appeal was taken from the assessment and, as no protest was made until the taxes were paid, the protest was too late.

3. That the arrangement of national and state banks in one section as appeared in Section 6 of the 1923 Act was not a classification for taxation purposes but only a method of assessment. Respondent admitted that shares of certain national banks, presumably competing with petitioner, escaped share taxation, but this was because of the limitations placed by Congress upon the State's power to tax national bank shares. The failure of the State effectively to tax national bank shares did not relieve the petitioner from liability for the tax on its shares.

4. The Legislature had the right to select its subjects

of taxation and to exempt such as it saw fit, and the exemption of shares of stock of the corporations named in the petitioner's complaint was not arbitrary but a legitimate prerogative of the State and did not violate any constitutional provision.

Upon the trial of the action all of the facts were agreed upon by the parties, and may be briefly summarized as follows:

Plaintiff, an Alabama corporation having its principal and only office in Montgomery, Alabama, was, at the times involved in the issues, engaged in a general commercial and savings bank business. It accepted deposits, made loans, with real and personal property as security, and loans without security, and purchased and dealt in municipal and other bonds and securities. (R. 28)

During the year 1930, and continuously thereafter, there were building and loan associations, mortgage corporations, industrial loan corporations, insurance companies and industrial banks located in Montgomery, Alabama, and elsewhere in the state, which loaned money and otherwise engaged in substantial and actual competition with petitioner, and with two national banks located in Montgomery, Alabama, the capital and shares of which other corporations were either wholly exempted from taxation or were taxed at a lesser rate than the shares of petitioner and the shares of the national banks, and during said time there were individuals, firms and partnerships who employed monied capital in the business of loaning money and otherwise engaging in substantial and actual competition with petitioner and with said national banks, and such monied capital was untaxed or taxed at a lesser

rate than the shares of petitioner and the shares of the national banks. (R. 31)

The national banks located in Montgomery, Alabama, were engaged in substantial and actual competition with petitioner. (R. 33) The Eighth, Ninth, Tenth and Eleventh paragraphs of the agreed statement of facts are as follows:

> "Eighth: In the State of Alabama during 1930, 1931 and 1932 to date, there were many hundreds of thousands of dollars of moneyed capital in substantial and actual competition with the business of both National Banks and State Banks located in the County of Montgomery and in the State of Alabama other than moneyed capital representing merely personal investments and not made in competition with such banking business, used and employed in the business of mortgage companies, industrial loan companies, investment security dealers and companies, building and loan associations, insurance companies and corporations, and individuals engaged in financial businesses, all of which loaned money on real and personal security and without security, some of which dealt in investment securities and otherwise used moneyed capital in substantial and actual competition with the business of both National Banks and State Banks, which moneyed capital is, and was during said period, taxed at a lesser rate in the sense of burden imposed, than the rate of taxation sought by Section 6 of the General Acts of 1923, page 152, to be exacted upon the shares of National Banks and the shares of State Banks located within the State of Alabama, or is, and was during said period, expressly untaxed or exempted wholly from taxation.
>
> "Ninth. During said years 1930, 1931 and 1932 to date, there were and are building and loan associa-

tions, industrial loan companies and corporations, and industrial banks which engaged in business in the City of Montgomery, Montgomery County, Alabama, and loaned money in substantial and actual competition with the National Banks located in said City and County of Montgomery and in substantial and actual competition with the plaintiff State Bank to the extent of hundreds of thousands of dollars, the shares of capital stock and capital of which were, during said period, exempted from the assessment and payment of ad valorem taxes and were left by the laws of Alabama entirely untaxed, or were taxed at a lesser rate, in the sense of burden imposed, than the said shares of plaintiff or the shares of National Banks. During said period there were likewise mortgage companies and corporations making loans on real estate in the City of Montgomery and County of Montgomery and purchasing mortgages and mortgage notes on real estate in said City and County to the extent of many thousands of dollars in substantial and actual competition with the businesses conducted by the National Banks located in the City of Montgomery, Montgomery County, Alabama, and the plaintiff bank, which were exempted by the laws of Alabama from any tax upon their shares of capital stock or capital or left by the laws of Alabama wholly untaxed for ad valorem tax purposes with respect to their shares of capital stock, or were taxed at a lesser rate, in the sense of burden imposed, than the said shares of plaintiff or the shares of National Banks. During said period, there were insurance companies organized under the laws of Alabama and doing business in said City of Montgomery, Alabama, lending money on mortgages and purchasing state, municipal and other bonds in substantially the same manner as state and national banks located in Alabama, to the extent of many thousands of dollars,

which were entitled to certain credits or exemptions in computation of the tax assessed upon their shares of capital stock or capital by the laws of the State of Alabama for ad valorem tax purposes, which credits or exemptions were not accorded under the laws of Alabama in computation of assessments on the shares of capital stock or capital of said National Banks and State Banks, including said shares of plaintiff bank. During the said period, in the conduct of plaintiff's business and in the conduct of the businesses of the National Banks located in said City and County and in lending money and purchasing notes, bonds, stocks and securities, plaintiff bank and said National Banks found in actual and substantial competition with them other individuals, persons, firms, associations and corporations engaged in like business or businesses and using moneyed capital therein to the extent of many thousands of dollars, which moneyed capital was not assessed or taxed for ad valorem taxes under the laws of Alabama and was either expressly exempted by said laws or left untaxed by said laws, or was taxed, at a lesser rate, in the sense of burden imposed, than the said shares of plaintiff or the shares of National Banks. During said period, a large amount of property of like character to that of the shares of capital stock and capital of plaintiff bank and said National Banks, in the form of money loaned, bills and notes discounted, securities bought and sold, by a large number of persons, firms and corporations engaged in like businesses to the businesses of said National Banks and State Banks, including plaintiff bank, to the extent of many thousands of dollars in actual and substantial competition with the business of said National Banks and plaintiff bank was not assessed for taxation but was exempted by the laws of Alabama from ad valorem taxation or left untaxed by said

laws, or was taxed at a lesser rate, in the sense of burden imposed, than the said shares of plaintiff or the shares of National Banks.

"Tenth. During the time herein mentioned there were located and doing business in said City and County of Montgomery two National Banks and in the State of Alabama many National Banks which carried on the businesses of receiving and accepting deposits from persons, firms, associations and corporations residing or located and doing business in said City and County and also in other cities and counties in the State of Alabama and elsewhere, making loans to persons, firms, associations and corporations residing or located and doing business in said City and County of Montgomery and also in other cities and counties in the State of Alabama and elsewhere on real estate and personal property security, and without security, and purchasing and dealing in and with real estate mortgages, bonds of the State of Alabama and of the United States and other States, and bonds and other obligations and securities of governmental subdivisions of said State of Alabama, the United States and other States, and of private corporations and others and engaged generally in the business of commercial and savings banks. The said businesses carried on by said National Banks were and are in substantial and actual competition with the businesses carried on and transacted by the plaintiff during the time herein mentioned.

"Eleventh. That many of the corporations hereinabove mentioned are corporations organized and existing under the laws of Alabama and that during the times herein mentioned thousands of the shares of the capital stocks of said Alabama corporations were held and owned by the shareholders thereof."

A copy of the opinion of the Attorney General holding

that these shares were not liable for ad valorem taxes was introduced (R. 12-15), and it was admitted no taxes had been collected on account of such shares during the tax year 1930-1931, and that no effort to collect same had been made, and that respondent did not intend to collect same (R. 34).

The decisions of the United States District Court in Alabama holding that the shares of national banks located in Dothan, Troy and Selma, Alabama, respectively, were not liable for ad valorem taxes had not been appealed from. The time had expired in two cases and no appeal was intended to be taken in any of the cases (R. 33).

Petitioner paid the taxes under duress and under protest and respondent had the amount so paid in his custody and possession (R. 15-20, 34).

On the trial in the Circuit Court judgment was rendered in favor of petitioner for the full amount sued for. (R. 27). Respondent perfected an appeal to the Supreme Court of Alabama, which Court on May 19, 1932, reversed the judgment of the lower court and remanded the cause (R. 38). The decision was by a divided Bench, four of the Associate Justices concurring, and the Chief Justice and two Associate Justices dissenting. The opinion and dissenting opinion appear in the record at pages 39 to 56. The case has not yet been officially reported, but is reported in 142 Southern Reporter 552.

Petitioner, on June 1st, 1932, within the time allowed, filed an application for rehearing (R. 38). The application for rehearing was disallowed on June 16, 1932, and the former judgment of reversal and remandment was changed to a judgment reversing the judgment of the Circuit Court and rendering judgment together with costs in favor of respondent (R. 38).

SPECIFICATION OF ERRORS

The final decision and judgment of the Supreme Court of Alabama is erroneous in the following respects:

(a) It denies the petitioner the equal protection of the laws, contrary to the Fourteenth Amendment to the Constitution of the United States, in that under the statutes of Alabama shares of stock of corporations engaged in substantial and actual competition with petitioner are exempted from taxation, or are untaxed.

(b) It denies the petitioner the equal protection of the laws, contrary to the Fourteenth Amendment to the Constitution of the United States, in that under the statutes of Alabama monied capital in substantial and actual competition with petitioner is untaxed or expressly exempted from taxation.

(c) It denies the petitioner the equal protection of the laws, contrary to the Fourteenth Amendment to the Constitution of the United States, in that the State of Alabama has failed to levy a valid and legal tax on the shares of national banks engaged in substantial and actual competition with petitioner.

(d) In holding that there was no illegal or wrongful discrimination, contrary to the Fourteenth Amendment to the Constitution of the United States, by the State of Alabama in taxing shares of petitioner and exempting from taxation or failing to tax shares of corporations engaged in substantial and actual competition with petitioner.

(e) In holding that the taxing statutes of Alabama make no illegal discrimination, contrary to the Fourteenth

Amendment to the Constitution of the United States, against petitioner.

(f) In holding that the State of Alabama could tax shares of petitioner and exempt from taxation or fail to tax shares of competing corporations and monied capital coming into competition with petitioner, contrary to the equality clause of the Fourteenth Amendment to the Constitution of the United States.

(g) In holding that the taxes collected and exacted by respondent from petitioner were not illegally and erroneously collected under the statutes of Alabama, contrary to the Fourteenth Amendment to the Constitution of the United States.

SUMMARY OF ARGUMENT

I.

The State of Alabama has classified as a single class for the purposes of ad valorem taxation the shares of state and national banks.

General Acts of Alabama of 1923, page 152, Section 6, appendix.

II.

By reason of the existence, during the year 1930 and thereafter, of untaxed monied capital and corporate shares in actual and substantial competition with the two national banks in Montgomery, Alabama, the tax levied by Alabama upon the shares of said national banks became invalid and ineffective as to their shares.

Opinion of the Attorney General of Alabama, dated January 29th, 1932, R. 12 to 15 inclusive;
Ward v. First National Bank of Hartford, 142 So. 93 (not yet officially reported);
Mercantile National Bank v. New York, 121 U. S. 138;
Merchants National Bank v. Richmond, 256 U. S. 635;
First National Bank v. Anderson, 269 U. S. 341;
First National Bank of Hartford v. Hartford, 273 U. S. 548;
Minnesota v. First National Bank of St. Paul, 273 U. S. 561;
Georgetown National Bank v. McFarland, 273 U. S. 568;
Iowa-Des Moines National Bank v. Bennett, 284 U. S. 239.

III.

The Fourteenth Amendment to the United States Constitution requires equal treatment with regard to ad valorem taxation of all property and taxpayers classified as a single class for taxation purposes.

Central State Bank v. Bennett, 284 U. S. 239;
Sioux City Bridge Company v. Dakota County, Nebraska, 260 U. S. 441;
Greene v. Louisville & Interurban R. R. Co., 244 U. S. 499;
Raymond v. Chicago Union Traction Company, 207 U. S. 20;
Cummings v. Merchants National Bank, 101 U. S. 153;
Cumberland Coal Company v. Board of Revision, 284 U. S. 23;
Sunday Lake Iron Company v. Wakefield Twp., 247 U. S. 350;
Munn v. Des Moines National Bank, 18 Fed. 2nd, 269;
Ashland County Bank et al. v. Village of Butternut, 241 N. W. 638 (not yet officially reported).

IV.

This Court is not bound by the construction placed by a state court upon state statutes or the operation and effect thereof as applied and enforced by the State where rights secured by the Federal Constitution are involved.

St. Louis S. W. R. Co. v. Arkansas ex rel. Norwood, 235 U. S. 350;
Spraigue v. Thompson, 118 U. S. 90;
Poindexter v. Greenhow, 114 U. S. 270;
Baldwin v. Franks, 120 U. S. 678;
United States v. Ju Toy, 198 U. S. 253.

V.

Shares of national and state banks are the same species of property for ad valorem taxation, and no discrimination can be made in favor of one and against the other.

See cases under III supra and also the following:
State Bank v. Board of Revenue, 91 Ala. 217;
Commercial State Bank v. Wilson, 53 South Dakota 82;
Central National Bank v. Sutherland, 113 Neb. 126;
State Bank v. Endres, 109 Neb. 753;
State v. Mady, 83 Montana 418;
Security Savings Bank v. Board of Review, 189 Iowa 463;
Ashland County Bank et al. v. Village of Butternut, 241 N. W. 638 (not yet officially reported—Wisconsin).

VI.

Untaxed property competitive with petitioner existing in the form of the shares of said Montgomery national banks and monied capital and shares of other corporations in actual and substantial competition with petitioner, the assessment, levy and forced collection by Alabama of an ad valorem tax upon the shares of petitioner denies to petitioner and its shareholders the equal protection of the law contrary to the Fourteenth Amendment to the United States Constitution.

See cases under III supra and also the following:
F. S. Royster Guano Company v. Virginia, 253 U. S. 412;
Louisville Gas & Electric Company v. Coleman, 277 U. S. 32;

Airway Electric Appliance Corporation v. Day, 266 U. S. 71;
Schlesinger v. Wisconsin, 270 U. S. 230;
Quaker City Cab Company v. Pennsylvania, 277 U. S. 389;
Southern Railway Company v. Greene, 216 U. S. 400.

ARGUMENT

I.

Ad Valorem Taxation in Alabama

The Alabama constitutional provisions and statutes material to the issues here involved are briefly summarized.

Section 211 of the Constitution of Alabama of 1901 is

> "All taxes levied on property in this state shall be assessed in exact proportion to the value of such property, but no tax shall be assessed upon any debt for rent or hire of real or personal property, while owned by the landlord or hirer during the current year of such rental or hire, if such real or personal property be assessed at its full value."

Section 217 of the Constitution of Alabama of 1901 is

> "The property of private corporations, associations, and individuals of this state shall forever be taxed at the same rate; provided, this section shall not apply to institutions devoted exclusively to religious, educational, or charitable purposes."

These sections appeared in substantially similar form in the preceding State Constitution back to 1875. Therefore, cases decided by the Supreme Court of Alabama prior to 1901 as well as the more recent cases can be consulted in determining the construction of these provisions.

In *Mayor of Mobile v. Stonewall Insurance Company*, 53 Ala. 570, the Alabama Supreme Court, in considering a tax levied by the City of Mobile imposing a higher rate on property of individuals than on corporate property, said:

"Invidious exemptions or discriminations, by which the property of an individual, or of a corporation, is relieved from bearing a just proportion of the common burden taxation is intended to discharge, are violative of the equality of right of the citizen, which is a fundamental principle of our institutions. * * * If property of a particular kind is subjected to taxation, and owned by a corporation, it must bear the rate of taxation imposed on individuals. While the constitution inhibits the exemption or discrimination in favor of corporations, it equally inhibits a discrimination against them. Equality in bearing a common burden, which is natural right and equity, is secured alike to the corporation and to the citizen."

In *Moog v. Randolph*, 77 Ala. 597, the Alabama Supreme Court, in considering the effect of these constitutional provisions, said:

"It is settled that the general purpose of these clauses is to establish an *ad-valorem* system of taxation, thus exacting a certain kind of uniformity in the rules of taxation, as applied to the property of all persons, whether private or artificial. Sections similar in phraseology and signification, are found in the constitutions of some of our sister States. Their object has been construed to be, to secure, as far as practicable, that equality in bearing the just burdens of government, which has become a distinguishing characteristic of the American States, and has been well denominated the corner-stone of Anglo-Saxon liberty. These clauses have never been construed to exact the taxation of all property, of every description, in the State, at precisely the same rate of taxation, without regard to its peculiar nature, uses, or other characteristics. Nor can they any more be interpreted to prohibit exemptions from taxation, or

such *classifications of property,* as are not purely arbitrary, capricious, or without the semblance of reason.—*Clark & Murrell v. Port of Mobile,* 67 Ala. 217; *Mayor of Mobile v. Stonewall Ins. Co.,* 53 Ala. 570; Cooley's Const. Lim. 515; Burroughs on Tax. pp. 65-69, sections 53, 54. As observed by Judge Cooley, 'It is difficult to conceive of an exemption law which selects single individuals or corporations, or single articles of property, and, taking them out of the class to which they belong, makes them the subject of capricious legislative favor. Such favoritism could make no pretense to equality; it would lack the semblance of legitimate tax legislation.' Cooley on Tax. 153, 183; *Howell v. Bristol,* 8 Bush, 493."

The same court, in considering these constitutional provisions in *Phoenix Carpet Company v. State,* 118 Ala. 143, stated:

"The two sections of the Constitution supposed to be violated, read as follows: '1. All taxes levied on property in this State shall be assessed in exact proportion to the value of such property: *provided, however,* the General Assembly may levy a poll tax, not to exceed one dollar and fifty cents on each poll, which shall be applied exclusively in aid of the public school fund in the county so paying the same.' 'Section 6. The property of private corporations, associations, and individuals of this State shall forever be taxed at the same rate; *provided,* this section shall not apply to institutions or corporations devoted exclusively to religious, educational, or charitable purposes.' These sections by their terms relate only to direct taxes on property—it is only such taxes which are levied and assessed; and as to such taxes, they place corporations on an equality with natural persons; there can be no discrimination between them."

In *State v. Birmingham Southern Railway Company,* 182 Ala. 475, it was stated with reference to the meaning of Section 211 of the Alabama Constitution:

> "The purpose and scope of this constitutional limitation upon the taxing power has been frequently considered by this court, and the substance of our decisions is that it was designed to secure uniformity and equality by the enforcement of an ad valorem system of taxation and to prohibit arbitrary or capricious modes of taxation without regard to value. —*Moog v. Randolph,* 77 Ala. 597, 602; *W. U. Tel. Co. v. State Board, etc.,* 80 Ala. 273, 275, 60 Am. Rep. 99; *Assessment Board v. A. C. R. R. Co.,* 59 Ala. 551; *Mayor of Mobile v. Stonewall Ins. Co.,* 53 Ala. 570. This does not mean that all property must be taxed. —*Moog v. Randolph,* supra; *State Bank v. Board of Revenue,* 91 Ala. 217, 223, 8 South. 852. Nor does it prohibit exemptions from taxation or such classifications of property as are not purely arbitrary, capricious, or without the semblance of reason.—*Moog v. Randolph,* supra. It does, however, prohibit the Legislature from prescribing or declaring an arbitrary or artificial value of the property of individuals or corporations, and assessing taxes on such valuation. —*Assessment Board v. A. C. R. R. Co.,* supra. It is perfectly clear that there is nothing expressed or implied in the language of this limitation which prohibits the Legislature from fixing as a basis for taxation any percentage of the actual value of property, whether greater or less than 100 per cent. thereof, provided only that such rule is applied without discrimination to all property of the same nature."

The effect of the decisions is that all subjects of property upon which the State levies an ad valorem tax must be taxed at the same rate and accorded equality of treat-

ment, that the Legislature may select the subjects of taxation and accordingly may exempt from taxation such classes of property as it may determine, provided that its classifications for such exemptions are not "arbitrary, capricious or without the semblance of reason."

Out of these rules has grown the structure of the Alabama ad valorem taxing statutes.

As early as 1876 (Code of Alabama 1876, Sections 359 et seq.), the Alabama practice with respect to ad valorem taxation was adopted of

1. Providing for a levy at a uniform rate on such property as was not specifically exempted;

2. Providing for certain specific exemptions from taxation by classifications;

3. Providing procedure for determination of assessed value for taxation, which procedure varied materially with respect to different types or classes of property to be taxed.

That this practice may be properly followed subject to the limitation that no arbitrary, capricious or unreasonable discriminations or distinctions be made is unquestionably the rule adopted and adhered to by the Alabama Supreme Court with respect to the applicable provisions of the State Constitution. Of course the limitations of the Fourteenth Amendment to the Federal Constitution must also be observed.

So since 1876 the Alabama Revenue Laws have been so framed as to substantially differentiate the bases of fixing assessed values of various types or classes of property for ad valorem taxation. For example,

(1) Real estate and tangible personal property generally is assessed at sixty per cent of its fair and reasonable market value on October 1 in each year;

(2) Stocks of goods, wares and merchandise are assessed at sixty per cent of the average amount on hand during the preceding year with a minimum dependent upon the capital actually employed in the merchant's business and this without regard to the amount on hand or value on October 1;

(3) Corporate shares are variously assessed

(a) Of state and national banks at sixty per cent of fair and reasonable market value October 1 in each year less deduction for real estate and furniture and fixtures owned,

(b) Of domestic corporations generally at sixty per cent of fair and reasonable market value October 1 in each year less deductions of all property assessed directly by the corporation,

(c) Of insurance companies the same as domestic corporations generally less an additional deduction for United States and Alabama bonds owned,

(d) Of foreign corporations (unless listed and registered under a statute adopted in 1927) at sixty per cent of fair and reasonable market value October 1 in each year without any deductions;

(4) Pullman car company property is not valued for assessment but the company pays a flat annual amount in lieu of all other taxation;

(5) Property of railroads, public utilities, telephone and telegraph companies, etc., is assessed by the State Tax Commission instead of the County Tax Assessors and assessed value thereof determined by franchise and in-

tangible values not considered in assessing property of other types of corporations. Earnings, market values of securities, average number of cars operated in the State during the year, car miles operated, and like factors enter into the determination of assessed value by specific provision of the statute. The assessment is at sixty per cent of the value so determined.

General Acts of Alabama of 1919, page 282, Section 5;
General Acts of Alabama of 1923, page 152, Section 6;
General Acts of Alabama of 1927, page 139, Section 25;
General Acts of Alabama of 1923, page 152, Sections 74 & 76;
General Acts of Alabama of 1919, page 282, Sections 157 et seq.

We find these classifications and distinctions recognized and pronounced constitutional by the Alabama Supreme Court.

State v. Burchfield, 211 Ala. 30;
State v. Seals Piano Co., 209 Ala. 93;
Ceylon Co. v. Hawkins, 206 Ala. 246.

Classifications for specific exemptions which may be pertinent to the issues herein with the effective dates thereof have been as follows:

Mortgages upon which the recording privilege tax has been paid and the debts secured thereby, 1903 to date.

General Acts of Alabama of 1903, page 227;
Section 3022 Code of Alabama, 1923, appendix.

Money on deposit in banks, 1915 to date.

General Acts of Alabama of 1915, page 386, Section 2.

Solvent credits, 1919 to date.

General Acts of Alabama of 1919, page 282, Section 2.

Shares of building and loan associations, 1923 to date.

General Acts of Alabama of 1923, page 152, Section 8.

Shares of mortgage companies or corporations making loans on real estate or purchasing mortgages or mortgage notes on real estate and industrial loan companies or corporations, 1927 to date.

General Acts of Alabama of 1927, page 139, Section 25, appendix.

The dissenting opinion in this case contains a review of bank share taxation in Alabama. (Record, pages 43 to 46)

Since at least 1896 the State of Alabama has placed shares of state and national banks in the same classification by the same sentence of the same section of the same statute, taxing them at the same rate and providing the identical method for arriving at their taxable values, and since that time no discrimination has been attempted by the Legislature in favor of one and against the other.

Section 3911, subdivision 8, of the *Code of 1896*;
Section 2082, subdivision 8, of the *Code of 1907*;
General Acts of Alabama of 1911, page 159, Section 25;

General Acts of Alabama of 1915, page 386, Section 12;
General Acts of Alabama of 1919, page 282, Section 9;
General Acts of Alabama of 1923, page 152, Section 6 (Appendix).

Throughout the period covered by these statutes the State Legislature has enacted and re-enacted this legislation in accordance with the pronouncements of the Alabama Supreme Court in

Pollard v. State ex rel Zuber, 65 Ala. 628, and
State Bank v. Board of Revenue, 91 Ala. 217.

The State recognized the distinction between a tax on the bank and a tax on its shares pointed out by that Court as follows:

> " 'The tax on the shares is not a tax on the capital of the bank. The corporation is the legal owner of all the property of the bank, real and personal, and within the powers conferred upon it by the charter and for the purposes for which it was created, can deal with the corporate property as absolutely as a private individual can deal with his own.' 'The interest of the shareholder entitles him to participate in the net profits earned by the bank in the employment of its capital,' etc. 'This is a distinct, independent interest or property, held by the shareholder like any other property that may belong to him. Now, it is this interest which the act of Congress has left subject to State taxation under the limitations prescribed.' "
>
> *National Commercial Bank v. Mobile*, 62 Ala. 284.

And the State recognized and observed the statement of its distinguished jurist, Chief Justice Stone, in *State Bank v. Board of Revenue*, supra, that

> "bank shares in a National bank, and bank shares in a State bank, belong to one species of moneyed capital. Any attempt to draw a distinction between them, as subjects of taxation, would be futile."

Accordingly, for the purposes of this case it is clear that in prescribing a taxing structure Alabama has, within the limits of the State Constitution as construed by its Supreme Court, classified state and national bank shares as a single class of property for ad valorem taxation for many years.

No inference of any holding by the majority below with respect to a contrary intention of the Legislature at any time may be drawn from the Per Curiam majority opinion. On the contrary, the opinion carefully refrains from overruling *State Bank v. Board of Revenue*, 91 Ala. 217, seeking only to distinguish it, and Mr. Justice Gardner (one of the majority) writes for the Court in *Ward v. First National Bank of Hartford*, 142 So. 93 (not yet officially reported). In this opinion, to which there was no dissent, Mr. Justice Gardner takes care to point out that each case with respect to taxation of shares of national banks in the State must depend on its own facts with respect to whether or not untaxed monied capital in substantial amount is actually in competition with the particular bank. This opinion was announced by the Alabama Supreme Court one week prior to its decision in the case at bar. It precludes any idea on the part of that Court that anything the Legislature had done with other sections of the State Revenue Law in anywise intended to affect Section 6 with respect to bank shares:

> "Counsel, appearing as amicus curiae, insist that the court should judicially know that substantial competition by the moneyed capital enumerated above

reaches all national banks in the state, and that proof as to each complaining bank should not be considered necessary. But no authority is cited and none have come to our attention which would justify such a course. It remains, in our opinion, a matter of proof in each case."

We therefore assert, with confidence, that the shares of state and national banks are under the Alabama taxing statutes and the decisions of the Alabama courts a single class or species of property for the purposes of ad valorem taxation.

II.

The Majority and Minority Opinions of the Supreme Court of Alabama

In the opinion below the majority stated, "We are in full accord with the minority view that 'there is no semblance of justice in taxing the shares of state banks and excluding those of national banks.'" The minority did not discuss the Federal question involved, finding it unnecessary to go beyond what in their opinion was a violation of the uniformity clause of the State Constitution to reach a correct conclusion. The essence of the majority opinion is contained in the following paragraphs:

"The power to tax the stock in banks of the United States,—agencies of the National Government, in the accomplishment of its constitutional purposes,—is not an inherent power residing in the State, but a power delegated by Congress. Such agencies cannot be taxed except by the consent of Congress.—Cooley's Const. Law (8th Ed.), Page 991.

"In the exercise of this delegated power the Legislature must conform to the restrictions in the acts of

Congress delegating this power, otherwise the effort of the Legislature to exercise this power is abortive and void.—Ward, Tax Collector v. First National Bank of Hartford, MS; Mercantile Bank v. New York, 121 U. S. 138.

"The limitation on the power of the Legislature to levy a direct tax on property, found in sections 211 and 217 of our Constitution, is a limitation on the inherent power of the State, and not on the power to tax delegated by the Federal statute. The limitation on this power is found in Section 5219 of the United States Revised Statutes.—Maguire v. Board of Revenue and Road Commissioners of Mobile County, 71 Ala. 401; Pollard v. The State, ex rel. Zuber, 65 Ala. 628.

"Therefore, when the Legislature, in the exercise of the power delegated by the Federal statute efficaciously levies a tax on the stock of United States Banks, in conformity with the statute, such levy reflects the limitation embodied in the Constitution in respect to the levy on subjects of taxation within the inherent power of the State, and requires substantial uniformity. Such was the case dealt with in State Bank v. Board of Revenue, 91 Ala. 217.

"But where, as in the case at bar, the attempted exercise of the delegated power of taxation under the Federal statute is abortive, there is no basis for applying the limitation embodied in Section 217 of the Constitution to taxes levied in the exercise of the State's inherent power on domestic bank stock; therefore, the plaintiff was not entitled to recover."

* * * * * * *

"Like reasoning as outlined in this opinion leads to the conclusion that the State system of taxation here questioned violates no provision of the Fourteenth Amendment to the Constitution of the United States. —Ohio Oil Co. v. Conway, 281 U. S. 146." (R. 40-41)

It is respectfully submitted that the conclusions reached by the majority in the Court below are based on fundamental misconceptions of the applicable State and Federal constitutional provisions and are fallacious in proceeding upon the following mistaken premises:

(a) That the State, in taxing national bank shares, is exercising taxing power of the Federal Government delegated by it to the State and not by virtue of any inherent power residing in the State;

(b) That the limitations contained in Sections 211 and 217 of the Alabama Constitution are not limitations on the power of the State to tax national bank shares but only apply to that property taxed under the "inherent" power of the State;

(c) That the limitations of the State Constitution only apply when the State has efficaciously taxed national bank shares and do not apply when the effort is "abortive";

(d) It wholly fails to take account of the fact that the Legislature of Alabama has grouped or classified state and national bank shares as one species of property for taxation purposes and has not manifested any other or different intent than that they be treated alike.

It is too well established to admit of argument at this stage that the Federal and not the State government is the government exercising limited, enumerated or delegated powers. The Tenth Amendment to the Federal Constitution was passed to put that question beyond any doubt.

Congress, therefore, as we conceive the situation, could not and did not *delegate* the power to tax shares of national banks in the hands of individual citizens of the State, but merely consented to the withdrawal of any objection on the part of the government of the United

States to the exercise of the power to tax such shares already inherent in the States, provided uniformity in taxation be preserved, finding by such consent that as a matter of fact if uniformity is so preserved no improper burden will be imposed upon the Federal agencies, the national banks, or upon the shareholders thereof.

Mr. Justice Van Devanter, in *First National Bank v. Anderson,* 269 U. S. 341, 347, said, with reference to the power of the States to tax national bank shares:

> "National banks are not merely private moneyed institutions but agencies of the United States created under its laws to promote its fiscal policies; and hence the banks, their property, and their shares cannot be taxed under State authority except as Congress consents and then only in conformity with the restrictions attached to its consent. * * *"

The exact form of expression used by Mr. Justice Swayne in *Farmers & Merchants National Bank v. Dearing,* 91 U. S. 29, is:

> "* * * In the complex system of polity which obtains in this country, the powers of government may be divided in four classes:
>
> "Those which belong exclusively to the States;
>
> "Those which belong exclusively to the National Government;
>
> "Those which may be exercised concurrently and independently by both;
>
> "And those which may be exercised by the States, but only with the consent, express or implied, of Congress.
>
> "Whenever the will of the nation intervenes exclusively in this class of cases, the authority of the State retires and lies in abeyance until a proper oc-

casion for its exercise shall recur. *Gilman v. Philadelphia,* 3 Wall. 713 (70 U. S. XVIII, 96); *Ex parte McNiel,* 13 Wall. 240 (80 U. S. XX, 625).

"The power of the States to tax the existing national banks lies within the category last mentioned."

Other cases dealing with the power of the States to tax Federal agencies are *Union Pacific Railroad Company v. Peniston,* 18 Wall. 5, and *Thomson v. Union Pacific Railroad Company,* 9 Wall. 579.

If our view of these authorities is correct, the holding of the majority that national bank shares are taxed under power *delegated* by the Federal Government and that this fact forms any basis for classification is unsound.

Regardless, however, of whether national bank shares are taxed under a delegated power or taxed under State sovereign power exercised with reference to them after Congress has lifted the immunity with which they were cloaked, the limitations of the State Constitution apply to the power of the State to tax them just as effectually and to the same extent that such limitations are applicable to the taxation of any other property located within the State.

If only the limitations contained in Section 5219 of the U. S. Revised Statutes are applicable to the power of the State to tax national bank shares, then if Congress should amend the section so as to repeal all limitations on the power of the State to tax, the State would have carte blanche authority to tax them without even conforming to the State constitutional limitations. Such a result would obviously violate the Fourteenth Amendment.

This Court in *Cummings v. Merchants National Bank,* 101 U. S. 153, in considering the rights of a national bank to protection under State constitutional provisions, said:

"But the Bank has the same right, under the laws and Constitution of Ohio, to be protected against unjust taxation that any citizen of that State has, and by virtue of its organization under the Act of Congress it can go into the courts of the United States to assert that right; so that if the assessment on its shares was a violation of the constitutional provision of that State concerning uniformity of taxation, the Circuit Court had jurisdiction of that question, concurrent with the State Courts, and we must review its decision."

See also *San Francisco National Bank v. Dodge,* 197 U. S. 70.

The majority of the Alabama Supreme Court did not hold that the Legislature had not intended to classify or had not classified state and national banks as one species of property. On the contrary, the legislative history of the State already reviewed shows that such shares had for many years been classified together and taxed alike. National banks for a long time were efficaciously taxed,—certainly until the state began its policy of exempting or failing to tax monied capital generally and, for aught that appears, until about 1930 and during that state tax year so far as this petitioner is involved.

It will be noted that the majority in the court below were careful not to overrule State Bank v. Board of Revenue, 91 Ala. 217, but in effect sought to distinguish it (R. 40), while the minority adhere strictly to that precedent. (R. 50-51) As that precedent is not overruled, the declaration therein is the law in Alabama as to legislative classification of bank shares for taxation. A pertinent discussion from the opinion in that case is as follows:

"What we do decide is, that whenever the legisla-

ture levies a tax on property, the rate must be in exact proportion to the value of such property; and that if a tax is imposed on any species of property, all property belonging to that species must be taxed at the same rate, whether it belongs to an individual, an association of persons, or to a private corporation. We mean by this, not only that, in this regard, natural persons, individuals or companies stand on the same footing with private corporations, but also that each individual association, or private corporation, is, under our constitution, endowed with the same rights, and subject to the same burdens, as are enjoyed or suffered by every other natural person, association of persons, or private corporation. The following authorities render it unnecessary for us to go into the argument at greater length.—Mayor of Mobile v. Stonewall Ins. Co., 53 Ala. 570; State Auditor v. Jackson County, 65 Ala. 142; Maguire v. Board of Revenue, 71 Ala. 401. See, also, Nat. Commercial Bank v. Mayor, 62 Ala. 284; Sumter Co. v. Nat. Bank, Ib. 464; Perry Co. v. Railroad, 65 Ala. 391; Pollard v. State, ex rel., Ib. 628.

"We need scarcely say that bank shares in a National bank, and bank shares in a State bank, belong to one species of moneyed capital. Any attempt to draw a distinction between them, as subjects of taxation, would be futile. In assessing the one, our statute allows a deduction of the taxpayer's indebtedness, and taxes the surplus. In assessing the other, it allows no such deduction. We hold that this is a violation of section 6, Art. XI of Alabama's Constitution, and that the shareholders in State banks are entitled to the same deductions as the statute accords to the shareholders of National banks."

The majority would distinguish both with respect to the provisions of the State Constitution and of the Fourteenth

Amendment between a differential within the same class or species of property where some tax is assessed on a part and a different tax is assessed on the other part of the class and such a differential where some tax is assessed on a part and no tax is assessed on the other part of the same class.

Our contention in the court below with respect to the State Constitutional question involved was suggested by the provisions of Sections 211 and 217 of the Constitution of Alabama. Section 211 provides, "All taxes levied on property in this State shall be assessed in exact proportion to the value of such property," and Section 217 provides, "The property of private corporations, associations and individuals in this State shall forever be taxed at the same rate." Essentially, these provisions of the State Constitution bear a close analogy to the purpose and intent of the Fourteenth Amendment and the majority opinion seeks to avoid the problem presented both by the State and Federal Constitutions by falling back upon the principle that exemptions and classifications for taxation purposes may be made within the limits that they shall not be arbitrary and unreasonable. We quote two paragraphs of the majority opinion which deal with this subject:

> "Upon the question of taxation, the Legislature of this State had the power to make exemptions and classifications free from interference by the courts unless there results inequality, not only oppressive in its operation, but so glaring as that it can be judicially declared to be founded on arbitrary and capricious principles, without the just semblance of reason. Subject to this limitation the legislative power to select proper subjects of taxation and to classify them upon principles which to them seem just, cannot be circumscribed by the courts. There must be, of

necessity, left a liberal scope for the free exercise of this presumably wise discretion.—Moog v. Randolph, 77 Ala. 597.

"Upon this well recognized principle the system of classification and exemption by the legislature as to moneyed capital is a matter resting within the law-making power, and is not such as to justify the interference by the court." (R. 41)

The minority opinion we think properly reaches the conclusion that under the requirements as to uniformity of taxation found in the State Constitution state bank shares might not be taxed at all if national bank shares wholly escaped taxation for any reason. It properly recognizes the shares of both as one and the same class or species of property for taxation.

Nothing in the Fourteenth Amendment prevents a state from "adjusting its system of taxation in all proper and reasonable ways." Our contention with respect to the error of the majority below fully recognizes this well settled rule. An analysis or a discussion of the many decisions relating to the effect of the Fourteenth Amendment upon state taxation of all sorts is unnecessary in this Court, which has so frequently reviewed the applicable rules.

The majority opinion of the Court below cites *Ohio Oil Company v. Conway*, 281 U. S. 146, as authority that petitioner's rights under the Fourteenth Amendment were not violated. In that case this Court considered a statute adopted by the State of Louisiana imposing a graduated excise severance tax on oils. Varying amounts of taxes were levied according to the gravity of each kind of oil, but as all oils of the same gravity were taxed alike, it was held that the statute did not violate the Fourteenth Amend-

ment. We fail to perceive wherein that ruling militates in any way against petitioner's claim in the present case. The controlling principles in the case were clearly defined by Mr. Chief Justice Hughes, who delivered the opinion. We quote from the opinion as follows:

> "With all this freedom of action, there is a point beyond which the state can not go without violating the equal protection clause. The state may classify broadly the subjects of taxation, but in doing so it must proceed upon a rational basis. The state is not at liberty to resort to a classification that is palpably arbitrary. The rule is generally stated to be that the classification 'must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' "

The point of importance in this connection is not the right of the State to properly adjust its tax system, so often reasserted by this Court, but the rights of citizens of the State to equality of treatment within a properly selected and designated classification for taxation made by the State in that process of adjustment.

The effort to tax national banks was not abortive for it was legally effective for many years and the tax became ineffective with respect to certain national banks in the State of Alabama only after a long period of time and upon the incidence of new facts, i. e., actual competition with the business of the two national banks in Montgomery. This result came about, not because of the adoption of a different system or method of taxing state and national bank shares, but because of exemptions of other property which, so far as this record develops, later became competitive.

Since 1896, as noted above, the State of Alabama has attempted to conform its taxation of monied capital in competition with banks and of the shares of banks to the limitations imposed by Section 5219. For many years not only monied capital in competition with banks as such but all monied capital was taxed alike by the State.

Under the decisions of this Court monied capital, untaxed or taxed at a different rate from national bank shares, must have been in existence in substantial amount and in actual or potential competition with the authorized businesses of national banks within the State in anywise to affect the taxation of shares of national banks under Section 5219.

Mercantile National Bank v. New York, 121 U. S. 138;
Merchants National Bank v. Richmond, 256 U. S. 635;
First National Bank v. Anderson, 269 U. S. 341;
First National Bank of Hartford v. Hartford, 273 U. S. 548;
Minnesota v. First National Bank of St. Paul, 273 U. S. 561;
Georgetown National Bank v. McFarland, 273 U. S. 568.

The case from Kentucky last above cited was decided adversely to the bank because the record failed to disclose the existence of such monied capital, in favor of which discrimination in taxation was practiced, in substantial amount and in actual competition with the complaining bank.

It was contended on the trial below, and it may be contended by the attorneys for respondent in this Court, that when the Legislature exempted capital which was or

might become competitive it by such action classified and intended to classify national bank shares in a different manner than had formerly been employed, that is, the Legislature intended to exempt such shares and to tax state bank shares. The majority of the Alabama Supreme Court did not, and we submit could not, have gone that far for the reason that Section 6 of the 1923 Act still remained when this proceeding was instituted in the same form as when enacted in 1923 and the Legislature has manifested no intent, either express or implied, that it be changed.

As previously noted, the decision of the Alabama Supreme Court in the case of *Ward v. First National Bank of Hartford,* 142 Sou. 93, not yet officially reported, which was rendered on May 12, 1932, just a week prior to the decision in the case at bar, is very significant in this connection in that the Court declined to hold that there were no national bank shares in the State which were not for the same state tax year as is herein involved taxable under the provisions of Section 6 of the 1923 Act. We repeat the quotation from that opinion as follows:

> "Counsel, appearing as amicus curiae, insist that the court should judicially know that substantial competition by the moneyed capital enumerated above reaches all national banks in the state, and that proof as to each complaining bank should not be considered necessary. But no authority is cited and none have come to our attention which would justify such a course. It remains, in our opinion, a matter of proof in each case."

If the burden is still on each complaining national bank in the State to show actual competition with untaxed monied capital, then the Legislature has not repealed Sec-

tion 6 insofar as it applies to national banks which cannot establish that they are in actual competition with exempt moneyed capital.

So in Alabama, insofar as national bank shares are concerned, the adjustment of the State's taxing system by the introduction of exemptions prior to October 1, 1930, when the tax in this case arose, did not necessarily result in a violation of Section 5219. Insofar as the Fourteenth Amendment might apply under the decisions mentioned, the shares of no national bank were free of the state levy in the absence of untaxed or favored monied capital in substantial amount and actually employed in competition or potential competition with the authorized businesses of that particular bank. The action of the Alabama Legislature in introducing new exemptions from time to time was not necessarily in anywise counter to the limitations imposed by Section 5219. Actual and substantial competition directly with a national bank on the part of the exempted monied capital was required to exist to permit of successful complaint by the national bank. So if *Ward v. First National Bank of Hartford, supra,* correctly states the views of the Alabama Supreme Court (it was a unanimous decision) there has never been any legislative action or intent to change that classification and no inference to the contrary may be drawn from that Court's decision in this case rendered within a week of its decision in that case.

The majority opinion below therefore, stripped of dicta and immaterialities, holds only, in its attempt to distinguish *State Bank v. Board of Revenue, supra,* that if the shares of a national bank be taxed at all in Alabama the shares of a competing state bank shall not bear a heavier tax burden, but that if the shares of a particular national bank escape taxation by reason of the existence of un-

taxed or favored competitive capital, the shares of a competing state bank may be made to bear alone a tax burden.—This, in spite of the declared policy of the State to prescribe equality of treatment to both. Such a doctrine, we submit, obviously infringes the Fourteenth Amendment and the State Constitution as well.

If the majority opinion had held (and we do not think it is susceptible to this interpretation) that the legislature expressly intended to exempt shares of national banks, this construction would not be binding on this Court as to rights secured by the Federal Constitution. We quote from the holding in the case of *St. Louis S. W. R. Co. v. Arkansas ex rel. Norwood,* 235 U. S. 350, as follows:

> "Upon the mere question of construction we are, of course, concluded by the decision of the state court of last resort. But when the question is whether a tax imposed by a state deprives a party of rights secured by the Federal Constitution, the decision is not dependent upon the form in which the taxing scheme is cast, nor upon the characterization of that scheme as adopted by the state court. We must regard the substance, rather than the form, and the controlling test is to be found in the operation and effect of the law as applied and enforced by the state."

An even stronger case in point is *Spraigue v. Thompson,* 118 U. S. 90. There the State of Georgia enacted a statute prescribing certain pilotage fees and regulations which the Supreme Court of Georgia held good as to its remaining enactments in spite of the admitted invalidity of certain provisions therein which conflicted with an express Federal statute prohibiting the States to make regulations or provisions with respect to pilotage making any

discrimination as to the rates of pilotage, etc., Section 4237, U. S. Revised Statutes. Quoting from the opinion:

> "It was held, however, by the Supreme Court of Georgia, in the case now before us, that so much of the section as makes these illegal exceptions may be disregarded, so that the rest of the section as thus read may stand, upon the principle that a separable part of a statute which is unconstitutional may be rejected, and the remainder preserved and enforced. But the insuperable difficulty with the application of that principle of construction to the present instance is, that by rejecting the exceptions intended by the Legislature of Georgia the statute is made to enact what confessedly the Legislature never meant. It confers upon the statute a positive operation, beyond the legislative intent and beyond what anyone can say it would have enacted in view of the illegality of the exceptions. We are, therefore, constrained to hold that the provisions of section 1512 of the Code of Georgia cannot be separated so as to reject the unconstitutional exceptions merely, and that the whole section must be treated as annulled and abrogated by section 4237 of the Revised Statutes."

In *Poindexter v. Greenhow*, 114 U. S. 270, 29 L. Ed. 185, in the face of issuance of bonds by the State of Virginia coupons on which were provided to be acceptable in payment of State taxes the Assembly passed a statute with respect to delinquent tax collections which did not preserve the right to pay in such coupons. The court held that the whole statute fell, saying:

> "It is undoubtedly true that there may be cases where one part of a statute may be enforced as constitutional, and another be declared inoperative and void, because unconstitutional; but these are cases

where the parts are so distinctly separable that each can stand alone, and where the court is able to see and to declare, that the intention of the Legislature was that the part pronounced valid should be enforceable, even though the other part should fail. To hold otherwise would be to substitute for the law intended by the Legislature one they may never have been willing by itself to enact. An illustration of this principle is found in the *Trade-Mark Cases*, 100 U. S. 82, (Bk. 25, L. Ed. 550), where an Act of Congress, which, it was claimed, would have been valid as a regulation of commerce with foreign nations and among the States, was held to be void altogether, because it embraced all commerce, including that between citizens of the same State, which was not within the jurisdiction of Congress, and its language could not be restrained to that which was subject to the control of Congress. 'If we should,' said the court in that case (page 99), 'in the case before us undertake to make, by judicial construction, a law which Congress did not make, it is quite probable we should do what, if the matter were now before that body, it would be unwilling to do.'

"Indeed it is quite manifest, from the face of the laws themselves, that they are together but parts of a larger whole."

Note also *Baldwin v. Franks*, 120 U. S. 678 and *United States v. Ju Toy*, 198 U. S. 253.

It is respectfully submitted that any contention that the legislature intended to exempt national bank shares from the provisions of Section 6 of the 1923 Act is refuted by the fact that the Supreme Court of Alabama in *Ward v. First National Bank of Hartford*, supra, has declined to so hold and also by an examination of the statutes themselves. Furthermore, such a position is imputing to the

legislature an intention to classify in a manner which the majority and dissenting opinions characterize as having "no semblance of justice."

The State having classified state and national bank shares under the same statute and in the same scheme of taxation, they are both entitled to equality of treatment and any discrimination in favor of one as against the other is violative of the Fourteenth Amendment.

The case of *Central State Bank v. Bennett*, 284 U. S. 239, appears to have definitely decided this question in the particular application to taxation of state and national bank shares.

The same principle has many times been announced and applied by this Court, by the lower Federal courts and by the State courts. We quote from the opinion of Mr. Chief Justice Taft in *Sioux City Bridge Company v. Dakota County, Nebraska*, 260 U. S. 441, as follows:

> "In the case of Sunday Lake Iron Co. v. Wakefield Twp., 247 U. S. 350, 352, 353, 62 L. ed. 1154-1156, 38 Sup. Ct. Rep. 495, this court said:
>
> " 'The purpose of the equal protection clause of the 14th Amendment is to secure every person within the state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents. And it must be regarded as settled that intentional, systematic undervaluation by state officials of other taxable property in the same class contravenes the constitutional right of one taxed upon the full value of his property.' " Citing
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> Raymond v. Chicago Union Traction Co., 207 U. S. 20, 35, 37, 52 L. ed. 78, 87, 88, 28 Sup. Ct. Rep. 7, 12 Ann. Cas. 757;

Greene v. Louisville & Interurban R. Co., 244 U. S. 499, 516-518, 61 L. ed. 1280, 1289, 1290, 37 Sup. Ct. Rep. 673, Ann. Cas. 1917E, 88;
Cummings v. Merchants' Natl. Bank, 101 U. S. 153, 160, 25 L. ed. 903, 905;
Taylor v. Louisville & N. R. Co., 31 C. C. A. 537, 60 U. S. App. 166, 88 Fed. 350, 364, 365, 372, 374;
Louisville & N. R. Co. v. Bosworth, 209 Fed. 380, 452;
Washington Water Power Co. v. Kootenai County, 270 Fed. 369, 374.

It was further stated in the same opinion:

"The dilemma presented by a case where one or a few of a class of taxpayers are assessed at 100 per cent of the value of their property, in accord with a constitutional or statutory requirement, and the rest of the class are intentionally assessed at a much lower percentage, in violation of the law, has been often dealt with by courts, and there has been a conflict of view as to what should be done. There is no doubt, however, of the view taken of such cases by the Federal courts in the enforcement of the uniformity clauses of state statutes and constitutions, and of the equal protection clause of the 14th Amendment. The exact question was considered at length by the circuit court of appeals of the sixth circuit in the case of Taylor v. Louisville & N. R. Co., 31 C. C. A. 537, 60 U. S. App. 166, 88 Fed. 350, 364, 365, and the language of that court was approved and incorporated in the decision of this court in Greene v. Louisville & Interurban R. Co., 244 U. S. 499, 516-518, 61 L. ed. 1280, 1289, 1290, 37 Sup. Ct. Rep. 673, Ann. Cas. 1917E, 88."

The case of *Ashland County Bank et al. v. Village of Butternut,* 241 N. W. 638 (not yet officially reported), decided by the Supreme Court of Wisconsin on March 8, 1932, is essentially identical with the case at bar. But the Wisconsin court reached a different conclusion from the majority of the Alabama Supreme Court. The Wisconsin court held that, as the State legislature had failed to tax all capital substantially competing with national banks but taxed only such competitive capital as was employed in a banking or investment business, the tax levied on national bank shares was ineffective as to them because of the violation of Section 5219 and was therefore also ineffective as to state bank shares because violative of the Fourteenth Amendment. We quote from the opinion as follows:

> "Since the laws mentioned were void as to national banks, the conclusion inevitably follows that they were also void as to state banks, for the reason that, since national banks could not be taxed thereunder, neither could state banks because state banks would thereby be subjected to a higher rate of taxation than national banks in violation of the Fourteenth Amendment to the Constitution of the United States.
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> * * * * * * *
>
> "That the constitutional rights guaranteed to the plaintiff by the Fourteenth Amendment were violated seems now, in view of the recent decision of the Supreme Court of the United States in Iowa-Des Moines Nat. Bank v. E. R. Bennett, 284 U. S. 239, 52 S. Ct. 133, 135, 76 L. Ed. ..., decided December 14, 1931, no longer an open question."

Other state cases in which similar holdings have been made with respect to resulting violations of state consti-

tutional provisions prescribing uniformity in taxation are

State Bank v. Board of Revenue, 91 Ala. 217;
Central National Bank v. Sutherland, 113 Neb. 126;
State Bank v. Endres, 109 Neb. 753;
Voran v. Wright, 129 Kansas 601;
Commercial State Bank v. Wilson, 53 South Dakota 82;
State v. Mady, 83 Montana 418;
Security Savings Bank v. Board of Review, 189 Iowa 463.

See also *Munn v. Des Moines National Bank,* 18 Fed. (2nd series) 269.

The minority of the Alabama Supreme Court were of the opinion that the principles laid down in *State Bank v. Board of Revenue,* 91 Ala. 217, supra, controlled in the present case. The majority opinion, however, seeks to differentiate that holding from the facts and applicable legal conclusions obtaining in the present case.

While the same or substantially the same questions here presented have been considered by many courts, we have failed to find any court holding in line with the opinion of the majority. Every other court which has passed on these questions appears to have reached an opposite conclusion.

III.

Pretermitting here, for argument only, our position and earnest insistence that Alabama has already classified state and national bank shares alike for taxation and that under the Fourteenth Amendment they should be accorded equality of treatment, it is respectfully submitted that national and state bank shares are so essentially similar that the State, having the right to tax both, can

not in its scheme of taxation discriminate in favor of one and against the other.

We had thought, until the decision of the majority in the case at bar, that this question had been settled in Alabama, insofar as the State Constitution was concerned, by the Alabama Supreme Court in *State Bank v. Board of Revenue,* 91 Ala. 217. We again quote from the opinion:

> "We need scarcely say that bank shares in a national bank, and bank shares in a state bank, belong to one species of monied capital. Any attempt to draw a distinction between them, as subjects of taxation, would be futile."

In the opinion of the Supreme Court of South Dakota in *Commercial State Bank v. Wilson,* 53 South Dakota 82, it was said:

> "There is no practical difference between the business of national banks and state banks, and it would hardly seem reasonable that a different classification for the purpose of taxation should be applied to one than is applied to the other."

The rule has been many times stated by this Court that arbitrary classifications not resting upon some reasonable grounds of difference are forbidden by the Fourteenth Amendment. In *Royster Guano Company v. Virginia,* 253 U. S. 412, Mr. Justice Pitney, writing for the Court, said:

> "Numerous and familiar decisions of this court establish that they have a wide range of discretion in that regard. But the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial

relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."

Mr. Justice McReynolds, in *Sunday Lake Iron Company v. Wakefield,* 247 U. S. 350, stated the rule as follows:

> "The purpose of the equal protection clause of the 14th Amendment is to secure every person within the state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents."

In *Power Manufacturing Company v. Saunders,* 274 U. S. 490, Mr. Justice Van Devanter, writing for the Court, said:

> "The clause in the 14th Amendment forbidding a state to deny to any person within its jurisdiction the equal protection of the laws is a pledge of the protection of equal laws (Truax v. Corrigan, 257 U. S. 312, 333, 66 L. ed. 254, 263, 27 A. L. R. 375, 42 Sup. Ct. Rep. 124; Atchison, T. & S. F. R. Co. v. Vosburg, 238 U. S. 56, 59, 59 L. ed. 1199, 1200, L. R. A. 1915E, 953, 35 Sup. Ct. Rep. 675), and extends as well to corporate as to natural persons (Smyth v. Ames, 169 U. S. 466, 522, 42 L. ed. 819, 840, 18 Sup. Ct. Rep. 418; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 154, 41 L. ed. 666, 667, 17 Sup. Ct. Rep. 255; Santa Clara County v. Southern P. R. Co., 118 U. S. 394, 396, 30 L. ed. 118, 6 Sup. Ct. Rep. 1132). It does not prevent a state from adjusting its legislation to differences in situation or forbid classification in that connection; but it does require that the classification be not arbitrary, but based on a real and substantial difference having a reasonable relation to the subject of the particular legislation."

State and national banks conduct substantially the same character of business and they are invariably, where located in the same communities, engaged in the keenest competition. The record (pages 32 and 33) shows that the business carried on and transacted by two national banks located in the City of Montgomery was in actual and substantial competition with the business of petitioner.

It is perhaps needless to say that if the State can levy a tax on shares of state banks and wholly exempt national bank shares and all other forms of monied capital in competition with state banks, the latter banks could not long survive. Such a system is so manifestly unfair and places state banks at such an obvious disadvantage in the keenly competitive world of business that it would be impossible in many instances for the state institutions to carry on: yet it is this system that the majority of the Court below have sanctioned.

The same rule would of course work both ways, that is, if there were no Congressional limitations contained in the statute allowing states to tax national bank shares, the State could, under the holding of the majority below, exempt state bank shares and all other competing capital and assess shares of national banks at the full rate.

It is respectfully submitted there are no sufficient differences between the shares of national and state banks to justify arbitrary classification by the State in favor of one and against the other. National banks are for many purposes considered the same as if residents of the state in which they are domiciled,—their shareholders are certainly so treated.

Our examination of the authorities fails to disclose that this Court has ever had occasion to pass on the question as to whether a discrimination against national bank

shares and in favor of state bank shares or other competitive capital would violate the Fourteenth Amendment. If no such case has arisen it is easily understandable for the reason that it has only been necessary to consider Section 5219 of the U. S. Revised Statutes, which affords as much if not more protection with respect to taxation of national bank shares than does the Fourteenth Amendment.

Analogous facts in other cases decided by this Court appear to lead to the conclusion that state and national bank shares are one species of property within the meaning of the Fourteenth Amendment. In *Southern Railway Company v. Greene*, 216 U. S. 400, it was held that the State could not subject a foreign corporation which had already come into the State and acquired property of a fixed and permanent nature to a new and additional franchise tax which was not imposed on domestic corporations. In the opinion delivered by Mr. Justice Day it was stated:

> "The equal protection of the laws means subjection to equal laws, applying alike to all in the same situation. If the plaintiff is a person within the jurisdiction of the State of Alabama within the meaning of the Fourteenth Amendment, it is entitled to stand before the law upon equal terms, to enjoy the same rights as belong to, and to bear the same burdens as are imposed upon, other persons in a like situation."

If in the above case it had appeared that the State of Alabama had assessed the additional franchise tax against domestic corporations and had exempted from the tax foreign corporations doing business in the State, it is respectfully submitted that the tax on domestic corpora-

tions would have been held invalid as violative of the Fourteenth Amendment.

In *Quaker City Cab Company v. Pennsylvania*, 277 U. S. 389, it was held that the imposition of a tax on the gross receipts of corporations operating taxicabs but not imposing a like tax on individuals and partnerships engaged in the same business unconstitutionally deprived foreign corporations operating in the State of the equal protection of the laws. We quote from the opinion prepared by Mr. Justice Butler:

> "The equal protection clause does not detract from the right of the state justly to exert its taxing power or prevent it from adjusting its legislation to differences in situation or forbid classification in that connection, 'but it does require that the classification be not arbitrary but based on a real and substantial difference having a reasonable relation to the subject of the particular legislation.' Power Mfg. Co. v. Saunders, 274 U. S. 490, 493, 71 L. ed. 1165, 1167, 47 Sup. Ct. Rep. 678. It is established that a corporation, by seeking and obtaining permission to do business in a state does not thereby become bound to comply with, or estopped from objecting to, the enforcement of its enactments that conflict with the Constitution of the United States."

In this connection see also

Cumberland Coal Company v. Board of Revision of Tax Assessments in Greene County, Pennsylvania, 284 U. S. 23;

Raymond v. Chicago Union Traction Company, 207 U. S. 20;

Sioux City Bridge Company v. Dakota County, 260 U. S. 441;

Carpenter v. Shaw, 280 U. S. 363;
Ward v. Love County, 253 U. S. 17;
Louisville Gas & Electric Company v. Coleman, 277 U. S. 32;
Airway Electric Appliance Corporation v. Day, 266 U. S. 71;
Schlesinger v. Wisconsin, 270 U. S. 230.

It has been contended that if the State in taxing state banks had to conform to the same system that it was required to follow with reference to national banks, it would destroy the State's power of classification. This contention is forcefully answered by the opinion delivered by Chief Justice Callaway of the Supreme Court of Montana in *State v. Mady,* 82 Montana 418:

> "It is argued that by thus restricting the taxation of national bank shares Congress has restricted, and may destroy, the State's power to classify property for the purposes of taxation. In one view this is a potent argument, but upon mature consideration we do not think it controlling. That Congress may not interfere with the taxation of property which it is the exclusive right of the State to tax will not be questioned. The difficulty here arises chiefly upon the requirements of the State Constitution. It requires the taxation of all property not exempt, and that the tax must be uniform upon the same class of subjects. The congressional requirement we are considering is not inconsistent with our constitutional provision requiring uniformity. It is thus our own fundamental law, acting co-ordinately with the law of Congress, which compels the State to tax State as well as national bank shares upon the same basis. The classification law placing national bank stock in class 6 and money coming into competition with the business of national banks in class 5 contravenes the provisions

of section 5219. To that extent the classification law was and is invalid; it is not lawful to tax national bank stock on the 40 per cent basis. Conceding that it is proper under the law to tax it on the 7 per cent basis, we find the law attempting to tax the State bank stock on the 40 per cent basis—property of exactly the same kind—a clear violation of the constitutional uniformity requirement. The State does not abrogate any part of its taxing power because it yields to Congress with respect to the taxation of a species of property which it could not tax without the consent of Congress, when its own fundamental law compels it to tax similar property upon the same basis on which it taxes property subject to the restrictions of Congress."

The State having the undoubted power to tax national bank shares at the full rate that it taxed other property, cannot arbitrarily decline to exercise this power and at the same time impose a tax on other subjects of the same class, viz.: state bank shares, without violating the equality clause of the Fourteenth Amendment. If it desires to tax one part of a class of taxable property it must tax all in that class. If the State were not allowed to assess the full rate of tax or impose a tax burden on shares of national banks equal to that which it could impose on other taxable subjects a different question would be presented, but that is not an issue involved in this case.

IV.

The record shows that during the years 1930, 1931 and 1932 there were building and loan associations, industrial loan companies and corporations and industrial banks in Montgomery which loaned money in substantial and actual competition with petitioner to the extent of hundreds of

thousands of dollars and that the shares of capital stock and the capital of such institutions were exempted from the assessment or payment of ad valorem taxes; that there were also mortgage companies and corporations and other individuals, persons, firms and associations engaged in like business and employing monied capital to the extent of many thousands of dollars in competition with petitioner, which were untaxed or exempted from taxation. (R. pp. 31-32)

If corporations are engaged in the same lines of business and are actually and substantially competing with each other, a system taxing the shares of a portion of such corporations without taxing all is a discrimination, and one which under the authorities of this Court appears to be in violation of the Fourteenth Amendment.

In *Royster Guano Company v. Virginia,* 253 U. S. 412, supra, it was held that a classification of Virginia corporations exempting those which did no business in the State except the holding of stockholders' meetings therein and imposing an income tax on those doing business in the State or doing business both within and without the State was illegal.

In the case at Bar, national and state banks and other corporations are all transacting similar lines of business in the same locality within the State. If the State exempts the shares of any such corporations from taxation, it must accord the same privilege and equality of treatment to all. In this connection we again call attention to the decisions of this Court hereinabove cited:

> *Cumberland Coal Company v. Board of Revision of Tax Assessments in Greene County, Pennsylvania,* 284 U. S. 23;

Raymond v. Chicago Union Traction Company, 207 U. S. 20;
Sioux City Bridge Company v. Dakota County, 260 U. S. 441;
Ward v. Love County, 253 U. S. 17;
Louisville Gas & Electric Company v. Coleman, 277 U. S. 32;
Airway Electric Appliance Corporation v. Day, 266 U. S. 71;
Schlesinger v. Wisconsin, 270 U. S. 230;
Quaker City Cab Company v. Pennsylvania, 277 U. S. 389.

V.

Briefly stated, the position of the respondent herein as disclosed by respondent's reply brief to the petition for writ of certiorari herein is as follows:

(1) Alabama may, without infringing either its own Constitution or the Fourteenth Amendment, adjust its tax system as it may see fit. This we, of course, concede to be a correct statement of the law provided that no arbitrary, capricious or unreasonable discriminations be made in the process of that adjustment.

(2) The failure to levy a valid tax against national bank shares does not invalidate the taxation of petitioner's shares. This we do not concede for obvious reasons. Alabama has in the adjustment of its tax system classified different types of property for the purposes of ad valorem taxation. Notably, as outlined above, it has treated inventories on a different basis for assessment than tangible property generally, it has treated corporate shares in different ways, it has treated railroad and public utility properties on a basis for taxation substantially different from manufacturing and mercantile properties generally

and it has, with the approval of the State Supreme Court, otherwise classified the property selected by it for taxation by prescribing substantially different methods of determining assessed values for taxation. As between classes it has prescribed different dates as of which assessed values are to be fixed and different elements to be the yardstick in fixing that value. In that process of classification it has, since 1896, exercised its right to tax the shares of national banks within its boundaries and classified together as a single class the shares of national and state banks. That classification has never been repealed. For years that classification has stood without change and without challenge until as a result of a new practice of exemption which for the year herein involved resulted in no taxation of certain competitive property the limitations imposed by Section 5219 of the U. S. Revised Statutes were violated. Then some of the national banks in the State naturally made the challenge, and successfully.

Respondent asks the question, "Does and can the exemption of national banks by indirection have any different effect" from action by the State had it "declined to attempt the taxation of national banks entirely?" Could a discrimination have been complained of had it so declined?

The fallacy of the suggestion in these questions lies in the fact that Alabama did not decline the attempt. On the contrary, for years it has treated the shares of national banks as part of the body of property subject to taxation by it. And for years it has classified them with the shares of state banks in accordance with the facts, for they are together a single class. Never expressly or by inference has the State Legislature repealed the statute, or any part of the statute, through which this result was intended.

The statement by the Alabama Supreme Court in *Ward v. First National Bank of Hartford, supra,* establishes without dispute that Court's view that the Alabama statute with respect to taxation of bank shares might effectually reach the shares of particular national banks in the State which could not prove the existence of untaxed property directly competitive with their business. In fact, the Legislature never evidenced the slightest intent to alter or amend the statute.

Having the undoubted right to tax the shares of national banks within the limits of Section 5219 of the U. S. Revised Statutes, it by no means follows that Alabama might, in disregard of the Fourteenth Amendment, decline to exercise that right and yet practice an arbitrary and capricious discrimination and tax the shares of state banks—property in the same class in fact and declared to be in the same class by its courts and by its Legislature in obedience to that declaration by its courts.

The discussion with respect to non-taxation of the personal property of banks and the real estate and electric plants of the Federal Government at Muscle Shoals has no bearing on this case for the State has never had the right to tax either.

(3) That the result of the petitioner's claim might in some way "narrow and descend until everybody is exempt."

This clearly is not the result. Actually there is and has been for years property classification in the Alabama tax system. Though the rate is uniform, the method of determining assessed values in different classifications is far from uniform. The thought that Congress by Section 5219 imposes its will on the State is erroneous. On the contrary, it permits the State to do what it should in all

conscience do, and what it has through its Legislature intended should be done—that is, tax with equality of burden property held by its citizens—bank shares—classified together with other such property within its borders. Exemptions added from time to time to the State taxing system do not alone bring about the result of which petitioner complains but only when coupled with a resulting exemption of property actually in competition with a national bank in each instance. When such a condition ensues, the Legislature must again act specifically if it would continue to reach the single class sought to be burdened so that the burden may fall equally on all in that class.

VI.

Central State Bank v. Bennett

In December, 1931, this Court rendered its decision in *Central State Bank v. Bennett,* 284 U. S. 239.

The record in that case discloses that the Iowa Constitution specifically permitted classification for taxation but required uniformity of treatment within each class. The statute under which the controversy arose classified together and levied a tax at the same rate upon the shares of national and state banks and monied capital and the shares of corporations in competition with the business of national banks. It classified separately and taxed at lower rates intangibles generally including, presumably, monied capital and shares of corporations not in competition with the business of national banks. In administering these laws the state officials systematically discriminated against bank shares in applying the second levy to some of the competitive property in the first named class.

In the opinion of this Court Mr. Justice Brandeis first points out that the practice of the State of Iowa in administering its laws clearly violated the limitations imposed by Section 5219 of the U. S. Revised Statutes insofar as the Iowa-Des Moines National Bank (the plaintiff in one of the cases covered by the decision) was concerned.

Turning to the *Central State Bank* case he says:

> "Both petitioners claim that they have been subjected to intentional, systematic discrimination in violation of the equal protection clause of the 14th Amendment. The federal right of the Central State Bank rests wholly upon that clause. It is assumed that there was such inequality of treatment as the Constitution prohibits.
>
> * * *
>
> "The right invoked is that to equal treatment; and such treatment will be attained if either their competitors' taxes are increased or their own reduced. But it is well settled that a taxpayer who has been subjected to discriminatory taxation through the favoring of others in violation of federal law, cannot be required himself to assume the burden of seeking an increase of the taxes which the others should have paid."

In that case, as here, the State had by statute classified together the shares of state and national banks. No different result in that case is conceivable had the taxing officials systematically pursued the practice of collecting no tax from the competitive property. Here because of the existence of certain facts the Alabama taxing officials had declared an intent, supported by the opinion of the At-

torney General of Alabama, not to collect or attempt to collect any tax for the year in question from the shareholders of two national banks located in the same city as petitioner and directly competitive with petitioner. They had wholly failed in view of certain statutory exemptions to assess or tax other competitive property. If the exemptions were unconstitutional the competitive property should have been taxed, if constitutional the Alabama statutes in connection with the fact that exempted property in substantial amount was in actual competition with the two national banks justified the officials in their discriminatory action. But neither the statute nor the facts are justification for the inequality in treatment of petitioner's shares which resulted in a clear infringement of the Fourteenth Amendment. These shares and the shares of the two national banks were in fact and by express statutory provision giving full effect to the decisions of the Alabama Supreme Court a part of a single class or species of property for taxing purposes. Other untaxed competitive property was undoubtedly in fact a part of that same class or species.

The Supreme Court of Wisconsin in a case on all fours with the case at bar correctly interprets the *Central State Bank* decision.

> *Ashland County Bank et al. v. Village of Butternut,* 241 N. W. 638.

As in the Central State Bank case, so here "the right invoked is that to equal treatment." As there, so here, discrimination within a class, in fact and by express legislative designation constituting a single class, has resulted in clear infringement of the Fourteenth Amendment.

It is submitted that the petitioner is entitled to the relief prayed and that the decision of the Supreme Court of Alabama should be reversed.

Respectfully submitted,

WILLIAM B. WHITE,
JOHN S. COLEMAN,
Attorneys for Petitioner.

APPENDIX.

The following are the Statutes of Alabama so far as material to this case:

General Acts of Alabama of 1923, p. 152, Sec. 6.

"*Taxation of Incorporated Banks.*—Every share of any incorporated bank or banking association incorporated under the laws of this State, or any other state, or of the United States, shall be assessed for taxation in the county, and in the city or town where such bank is located at sixty per cent of its fair and reasonable market value. For the purpose of determining the value of such shares, the president or managing officer of such bank, or banking association, shall make out and return under oath to the assessor of the county in which such bank is located, and to the State Tax Commission, a list showing the total number of shares of capital of such bank, the name and address of every shareholder, as far as known, the fair and reasonable market value of such shares and the par value thereof, what sales of stock have been made during the last twelve months, with the names of the sellers and buyers thereof, and the price paid for same, the annual dividends declared upon the stock for the last three years, the value of the shares as shown by the books of the bank by the last report of the officers to the shareholders, the amount of the surplus, and the amount of the undivided profits not included in the surplus, and such president or managing officer shall at the same time in the manner required by law, return to the assessor a statement of all real estate and improvements thereon, and furniture and fixtures, owned by the bank situated in this State and liable for taxation. The value of the shares of such bank for taxation shall be fixed by the Board of Review and said Board of Review in

fixing such value shall deduct from the total of the shares the reasonable market value, of the real estate and improvements thereon, and the furniture and fixtures belonging to such bank and assessed for taxation, and sixty per cent of the residue after such deduction shall be the assessed value of such shares, and such residue divided by the whole number of shares, shall constitute the assessed value of each share for taxation. It is the intent and meaning of this section that the real estate of every bank shall be assessed against the bank as other real estate in this State is assessed to the owner thereof, and that such bank shall pay the taxes thereon, and that the shares shall be assessed for taxation against the shareholders at sixty per cent of their fair and reasonable market value, as above determined after deducting therefrom the reasonable market value of the real estate and improvements thereon, and furniture and fixtures of the bank and that the bank shall pay for the shareholders respectively the tax so assessed, against their shares. In arriving at the fair and reasonable market value of the shares, there must be considered everything which gives them value, such as franchise, capital and assets of the bank, the real and personal property, the reserve fund and surplus, the undivided profits not included in the surplus, and all other interests of the shareholders that would pass to a purchaser on a transfer of his stock, and except as herein expressly provided, no separate tax shall be levied upon these elements, of value or any of them. It shall be no ground of objection to such assessment of shares that it is entered upon the assessment book in the corporate name of the bank."

General Acts of Alabama of 1923, p. 152, Sec. 7.

"*Reports Required of Banks.*—The reports required from banks by the preceding sections shall be

made on blanks furnished by the State Tax Commission. The failure of any banks to make the report required herein for the assessment for ad valorem taxation by December 31st of the year for which the tax is to be assessed shall subject such bank to a penalty of five dollars per day for each day's delinquency, which penalty may be collected by suit in the name of the State in any court of competent jurisdiction in Montgomery county, Alabama."

General Acts of Alabama of 1923, p. 152, Sec. 5.

"*Taxation of Unincorporated Banks.*—Any unincorporated bank, private bank or institution doing a banking business that is not incorporated shall be assessed at sixty per cent of its fair and reasonable market value. For the purpose of aiding in determining the amount of such assessment, the owner, president, cashier or manager of such bank shall under oath file with the tax assessor a statement in duplicate, one of which shall be forwarded to the State Tax Commission at Montgomery, Alabama, showing the capital of such bank, its surplus, undivided profits not included in the surplus, and all real estate owned by said bank and situated in this State, with a description of the same and the value of such real estate and the name of the person or the names of the persons who own said bank, what interest or interests in said bank have been sold during the past twelve months, the price of the same, the name of the seliers, and the purchasers, the annual dividends declared by such bank for the last three years and the amount of the capital, surplus and undivided profits not included in the surplus. The Board of Review or State Tax Commission may examine any person with reference to the matters mentioned in said affidavit, and from all sources of information herein provided for, and from all other information that may be ob-

tained, the Board of Review shall determine the amount of such capital, surplus, undivided profits not included in the surplus, and the value of the real estate of such bank. From the amount of the sum of the capital, surplus and undivided profits not included in the surplus so determined, the Board of Review shall deduct the value of the real estate of said bank. The bank shall pay a tax on the real estate and on the residue of all of its capital as above determined."

General Acts of Alabama of 1927, p. 139, Sec. 25.

"*Taxation of Domestic Corporations Except Banks and Building and Loan Associations.*—Every share of any domestic corporation (except banks or banking associations and building and loan associations, and mortgage companies or corporations making loans on real estate or purchasing mortgages or mortgage notes on real estate and industrial loan companies or corporations), shall be assessed and the taxes thereon collected in the county wherein such corporation has its home or chief office in the State, and shall be assessed at sixty per cent of its fair and reasonable market value to the person in whose name such shares stand on the books of the corporation and not to the corporation. The President or managing officer of every such corporation shall make out and return under oath to the tax assessor and to the State Tax Commission a list showing the total number of shares of capital stock of such corporation and the par value thereof, and the full name and residence of each stockholder, as far as known, the actual value thereof, the date of the last sale of shares of stock of such corporation, with the name of the seller and the purchaser and the price paid for the same, and the annual dividend declared on the stock of such corporation, for the last three years, and the value of the shares as shown

by the books of the corporation, and by the last report of the officers to the shareholders, and the amount of the surplus, and the amount of the undivided profits not included in the surplus, and such other information as may be required by the State Tax Commission. There shall be attached to the copy of the return made to the State Tax Commission a balance sheet showing the condition of such corporation at the close of its fiscal period next preceding October first of the year for which the assessment is to be made. Such corporations shall at the same time make a tax return sworn to by its president or manager, to the State Tax Commission and to the County Tax Assessor, on a form prescribed by the State Tax Commission, of all taxable property, real and personal, situated in the State and owned by such corporation, and the State Tax Commission after passing on the value of the shares of the capital stock, shall deduct from the total value of such shares the reasonable market value of the real and personal property of the corporation, as shown to be by such tax return of the corporation, and sixty per cent of the residue of value remaining after such deduction shall be the assessed value of the whole of such shares, and such sixty per cent of the residue divided by the whole number of shares, shall constitute the value of each share for taxation. Provided, however, that if any property owned by a corporation, which property is subject to taxation in this State, is omitted from the tax return filed by the corporation, the same shall be assessed as an escape item or items of taxation in the same manner as escaped property of individuals is assessed and the value of such omitted property shall not be deducted from the value of the shares of stock of the corporation as assessed for taxation. The corporation shall pay for the shareholders the tax assessed against his shares, and the amount so paid for any shareholder

shall be a lien on any interest which such shareholder may have in any property owned by the corporation. In arriving at the value of the shares of the stock of a corporation organized under the laws of Alabama for the purpose of conducting an insurance business, there shall be deducted from the value of such shares, in addition to the assessed value of its property, (the amount of its bonds of the State of Alabama, or bonds of any county or municipality thereof, and of the United States), held by such insurance corporation at the time of such assessment, which said bonds were held during all the six months preceding such assessment. If the aggregate value of shares does not exceed the aggregate value of the real and personal property of the corporation as returned for taxation, then no tax shall be demanded or collected on the shares, and no other deduction shall be made from the aggregate amount or sum at which the real and personal property of the corporation is returned for taxation than is herein specifically provided for. Provided that any corporation within the provisions of this section shall be entitled, for the purpose of arriving at the value of shares for taxation, to have deducted from the value of its shares, as fixed by the State Tax Commission, the assessed value of property owned by such corporation in other states or in other counties of this State on the next preceding first of October. The State Tax Commission and the tax assessor shall have a right to demand and receive of said corporation a certified copy of the assessment of any property outside of the State of Alabama sought to be deducted as above provided. The State Tax Commission shall deliver said assessment to the tax assessor with its other assessments of property in the county and notice of such assessment shall be given as in other cases. It shall be no ground for objection to such assessment of shares that the same is entered

upon the assessment books in the name of the corporation. Provided that no shareholder of any corporation which pays a tax on its franchise or intangible property shall be liable for the taxes specified in this section as to the same property. Provided, however, that the provisions of this Act, shall not apply to the shares of stock of domestic or foreign mortgage companies or corporations whose chief business is making loans on real estate, or purchasing mortgages and mortgage notes on real estate; nor shall this Act apply to the shares of domestic or foreign industrial loan companies or corporations, it being hereby expressly enacted that all shares of stock of such domestic and foreign mortgage companies or corporations and domestic and foreign industrial loan companies or corporations, shall be exempted from assessment and the payment of ad valorem taxes."

General Acts of Alabama of 1923, p. 152, Sec. 9.

"*Reports required on blanks furnished by State Tax Commission; penalty for failure to report.*—The reports required from corporations by the preceding sections shall be made on blanks furnished by the State Tax Commission. The failure of corporations to make reports required herein for the assessment for ad valorem taxation, by December 31st of the year for which the tax is to be assessed shall subject such corporation to a penalty of five dollars per day for each day's delinquency, which penalty may be collected by suit in the name of the State in any court of competent jurisdiction in Montgomery County, Alabama."

General Acts of Alabama of 1919, p. 282, Sec. 13.

"*State Tax Commission to furnish blanks; how paid for.*—That all blanks covering the assessment of

corporations shall be furnished by the State Tax Commission, the payment for such blanks to be paid out of the general appropriation for public printing."

General Acts of Alabama of 1919, p. 282, Sec. 14.

"*List of shareholders not required if corporation agrees to pay tax for such shareholders.*—If a corporation or a bank by endorsement on its tax assessment or otherwise in writing, shall agree to pay the taxes, if any, assessed on the shares for the shareholders, it need not file a list of such shareholders."

Section 3022 of the Code of Alabama of 1923.

"*Property and persons exempt.*—The following property and persons shall be exempt from ad valorem taxation and none other: (1) * * * all mortgages, together with the notes, debts, and credits secured thereby on real and personal property situated in this State, which mortgages have been filed for record and the privilege tax paid thereon; all money on deposit in any bank or banking institution in this State and all other solvent credits; * * *"

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

No. 346.

UNION BANK AND TRUST COMPANY,
Petitioner,

VS.

R. C. PHELPS, INDIVIDUALLY AND AS TAX COLLECTOR OF MONTGOMERY COUNTY, ALABAMA,
Respondent.

Reply brief of Respondent to petition for writ of certiorari to the Supreme Court of the State of Alabama, and brief in support thereof.

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THE WILSON PRINTING CO.
MONTGOMERY, ALA.

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Supreme Court of the United States

OCTOBER TERM, 1932.

No. 346.

UNION BANK AND TRUST COMPANY,
Petitioner,

vs.

R. C. PHELPS, INDIVIDUALLY AND AS TAX COLLECTOR OF MONTGOMERY COUNTY, ALABAMA,
Respondent.

Reply brief of Respondent to petition for writ of certiorari to the Supreme Court of the State of Alabama, and brief in support thereof.

STATEMENT OF THE MATTER INVOLVED.

This cause comes to this Court by petition for writ of certiorari to the Supreme Court of Alabama. The opinion of that Court in the case being reported in 142 So. 552, and appears in the record here at pages 39, 40 and 41.

There are two questions presented by this petition:

First. Does the exemption of certain property defined by Federal Courts as "moneyed capital" within the meaning of Section 5219, from ad valorem taxation invalidate the taxation of the shares of a state bank under the Fourteenth Amendment?

Second. Does the failure to tax the shares of national banks, because the State has not met the conditions prescribed by Section 5219 of the Revised Statutes, render the taxation of the shares of a state bank invalid under the Fourteenth Amendment?

The Petitioner, a State Bank, brought suit at law in the Circuit Court of Montgomery County, Alabama, against R. C. Phelps, the Tax Collector of said County, to recover the sum paid by it under protest on account of ad valorem tax assessment for State and County purposes against the shares of Petitioner. The grounds of the suit were in substance these; that the State of Alabama had exempted the shares of building and loan associations, mortgage companies, corporations making loans on real estate or purchasing notes on real estate, and industrial loan companies or corporations, from share taxation; that there is also exempted from ad valorem taxation mortgages together with the notes, debts and credits secured thereby, provided such mortgages had been filed for record and the privilege tax paid thereon; that the national banks located in Montgomery and other parts of Alabama had been relieved of the ad valorem taxation on shares because the failure of the State to tax such forms of property, had been held to violate Section 5219 of the Revised Statutes of the United States, as amended.

Petitioner claimed that the failure to tax these forms of property alleged to be moneyed capital in competition with it, violated Sections 211 and 217 of the Alabama Constitution and the equality clause of the Fourteenth Amendment of the Constitution of the United States.

Petitioner further claimed that the failure or inability to tax the shares of national banks likewise constituted a violation of Sections 211 and 217 of the State Constitution, and also of the equality clause of the Fourteenth Amendment.

Respondent by way of demurrer and answer plead defenses which in brief were as follows:

(1) That he was not indebted in the manner and form alleged.

(2) That no appeal had been taken from the assessment and no protest made until the time the taxes were paid and that the protest and suit for recovery came too late.

(3) That there is no classified property taxation system in the State of Alabama and that the arrangement of state and national banks in one Section as appears in Section 6 of the Act approved August 22, 1923, is not a classification for taxation purposes but is a method of assessment. That the Legislature cannot and did not by such procedure classify property nor levy different rates of taxation but taxed all property declared by it to be taxable at the same rate. Defendant admits that the shares of certain national banks presumably competing with plaintiff have escaped share taxation, but defendant avers that this is by virtue of the limitations put upon the State's power to tax them by the Congress of the United States, and that by the law of the State of Alabama they are taxed at the same rate as plaintiff. And defendant avers that the states have no power to tax national banks except as given it by Congress and that the failure or refusal of Congress to give plenary power to the states in the matter of share taxation, cannot relieve the defendant of its liability for such taxes and that the failure to tax the shares of national banks because of congressional limitations does not constitute a discrimination in violation of the State or Federal Constitutions.

(4) Defendant further avers that the Legislature has the right and power to select its own subjects of taxation and to exempt such as it sees fit. That the exemption of shares of mortgage companies and the other species of property named in the complaint is the legitimate prerogative and its exercise does not

constitute the taxation of property at a different rate and contrary to Sections 211 and 217 of the State Constitution. Defendant further avers that such exemptions do not render the taxation of plaintiff's shares void and unconstitutional.

Record, pages 22 and 23.

The statement of fact is set out on pages 28 and 34, inclusive, of the Record.

In brief it discloses that certain forms of property declared by the Federal Courts to be moneyed capital within the meaning of Section 5219 of the Revised Statutes, are exempt from taxation or are taxed at a lesser rate in the sense of burden imposed than are the shares of Petitioner. It is to be particularly noted that in every case where reference is made to property being taxed at a lesser rate, the words "in the sense of burden imposed" appear. This for the reason that the Court judicially knows that no taxable property in Alabama is taxed at a different rate, but presumably by virtue of such laws as the registration of mortgages and securities the burden of taxation is less than that of property taxed at regular ad valorem rates. These species of property are exempt from ad valorem taxation entirely; any taxes they pay are privilege taxes.

The Circuit Court rendered judgment in favor of the Petitioner. On appeal the Supreme Court reversed the judgment of the Circuit Court. The judgment of the Supreme Court appears in the Record on page 38. The opinion appears on pages 39 to 41, inclusive. The dissenting opinion appears on pages 41 to 56, inclusive, of the Record. From the decision of the Supreme Court of Alabama this petition for writ of certiorari is prayed.

BRIEF AND ARGUMENT

The Petitioner claims that the decision and judgment of the Supreme Court of Alabama violates the equal protection clause of the 14th Amendment because the shares

of corporations engaged in substantial competition with it are exempt, that moneyed capital in competition with it is exempt, and that the failure to levy a valid and legal tax on the shares of national banks is a violation of the equal protection clause of the 14th Amendment.

The Supreme Court of Alabama has decided that the taxation of the shares of State banks has not violated the equality clause of the State Constitution on any of the grounds urged by the Petitioner including those on which the protection of the 14th Amendment is here invoked. It likewise concluded "That the State system of taxation here questioned violates no provision of the 14th Amendment to the Constitution of the United States." It is to be noted that the dissenting opinion does not pass on the Federal question in any way.

We submit that the decision of the Supreme Court of Alabama removes any State question from discussion and the effect is to remove any Federal question.

THE EXEMPTIONS COMPLAINED OF DO NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

May we briefly summarize the facts and law involved:

The Constitution of Alabama declares that all property must be taxed at the same rate.

Constitution, Section 217.

This has been construed to apply to *taxable property* and not to apply to property exempt by law or to forbid the Legislature to make exemptions. We refer briefly to some of the cases:

> "The State has the power to exempt any class or item of property from taxation, and to declare what property shall be the subject of ad valorem or annual property taxation."

State vs. Birmingham Southern R. R. Co., 62 So. 77, 182 Ala. 475;
W. U. Telegraph Co. vs. State Board, 80 Ala. 273;
Phoenix etc. Co. vs. Montgomery, 117 Ala. 631;
Kidd vs. State, 188 U. S. 730.

"The power to classify is necessary to avoid oppressive results and is subject only to the limitations imposed by the State and Federal Constitutions. These limitations prohibit only those classifications which can be supported on no rational hypothesis."

W. U. Telegraph Co. vs. State Board, supra.

"Sections 211 and 217 of the Constitution of Alabama are not to be construed to prohibit exemptions from taxation nor reasonable classifications, nor to require the taxation of all property at precisely the same rate." M. & G. R. R. vs. Peebles, 47 Ala. 317;

Moog vs. Randolph, 77 Ala. 597;
Phoenix Co. vs. State, 118 Ala. 143.
In the present case the Court said:

"Upon the question of taxation, the Legislature of this State had the power to make exemptions and classifications free from interference by the courts unless there results inequality, not only oppressive in its operation, but so glaring as that it can be judicially declared to be founded on arbitrary and capricious principles, without the just semblance of reason. Subject to this limitation the legislative power to select proper subjects of taxation and to classify them upon principles which to them seem just, cannot be circumscribed by the courts. There must be, of necessity, left a liberal scope for the free exercise of this presumably wise discretion."

Apart from the question of national banks these decisions not only remove any State question, but we submit, also eliminate any Federal question.

The 14th Amendment does not require the states to follow any iron or set rule of taxation. The states can adjust their taxation system in whatever manner they deem fit so long as equal protection and due process are not denied.

The taxing power of the state is one of the highest attributes of sovereignty, essential to its continued existence, and may be exercised without limitation on all property, trades and business carried on within its boundaries unless prohibited by the State or Federal Constitutions.

> Railroad Company v. Peniston, 85 U. S. 5, at p 29;
> Royall v. Virginia, 116 U. S. 592, at p. 597.

In the exercise of its taxing power, the state, in the discretion of its legislature, may levy a privilege or occupation tax on *all occupations or business*, or it may *select* for taxation certain classes and leave the *others untaxed*.

> Armour Packing Co. v. Lacy, 200 U. S. 226, at p. 235;
> Southwestern Oil Co. v. Texas, 217 U. S. 114, at pp. 124, 125 and 126;
> Bell's Gap R. R. Co. v. Pennsylvania, 134 U. S. 232, at page 237;
> American Sugar Refining Co. v. Louisiana, 179 U. S. 89, at page 94;
> Hart Refineries v. Harmon, Treas., 49 Supreme Court Reporter, 188, at page 189.

In cases in which the Legislature selects certain classes for taxation, the classes so selected may be *further subdivided according to certain differences* without violating the *due process* and *equal protection* provisions of the Fourteenth Amendment to the Constitution of the United States, if the subdivisions are reasonable.

> Cooley on Taxation (4th ed.), Secs. 349-350;
> Southwestern Oil Co. v. Texas, 217 U. S. 114, at p. 126;
> Michigan Railroad Tax Cases, 138 Fed. 223, at p. 241;
> Metropolitan Life Ins. Co. v. City of Paris, 138 Ky. 801, 129 S. W. 112.

In determining whether a classification for an occupation tax is discriminating, the motives or special reasons actuating the legislature is of no concern to the court; neither is the wisdom of the classification of consequence. The determining factor lies in the answer to the question, does the burden fall alike upon all who are in substantially the same situation?

Cooley on Taxation (4th ed.), Section 350;
Southwestern Oil Co. v. Texas, 217 U. S. 114, at p. 126;
Oliver Iron Co. v. Lord, 262 U. S. 172, at p. 179;
Michigan Central R. R. Co. v. Powers, 201 U. S. 245, at p. 293;
Dane v. Jackson, 256 U. S. 589, at pp. 598-599;
Citizens Telephone Co. v. Fuller, 229 U. S. 322, at pp. 329-331;
McLean v. Arkansas, 211 U. S. 539, at p. 547;
Hart Refineries v. Harmon, Treas., supra.

A classification of occupations for taxation made by the legislature of a state which is not wholly unreasonable and arbitrary, and which is uniform in its operation on all members to which it is *made applicable*, is not violative of the equal protection guaranteed by the Federal Constitution.

Consumers' League v. Colorado, etc. R. Co., 125 Pac. 577;
Chicago, etc., R. Co. v. Arkansas, 219 U. S. 453, 466;
W. W. Cargill Co. v. Minnesota, 180 U. S. 453, 469.

The State is sovereign mistress of her own policy in establishing classes for the purpose of raising revenue by taxation and such classification will not be set aside except where there is no rational basis for the classification.

Ex parte Thornton, 12 Fed. 538;
Singer Sewing Mach. Co. v. Brickell, 233 U. S. 304.

The subjects and methods of taxation are legislative matters, and can not be disturbed so long as the method pre-

scribed is applicable alike to all within the prescribed class. Corporations, individuals, wholesale and retail dealers, domestic and foreign corporations may be separately classified and taxed differently, so long as all in the constituted classes are treated alike.

Kersey v. City of Terre Haute, 161 Ind. 471, at p. 472 et seq.;
State, ex rel Lewis, et al v. Smith, Aud., 158 Ind. 543, at p. 546;
Gafill v. Bracken, Aud., 195 Ind. 551, at p. 560;
State v. Hammond Pkg. Co., 233 U. S. 331.

In Bell's Gap Railroad Company v. Pennsylvania, 134 U. S. 232, this Court said:

* * * "The provision in the Fourteenth Amendment, that no state shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a state from adjusting its system of taxation in all proper and reasonable ways. *It may, if it chooses, exempt certain classes of property from any taxation at all,* such as churches, libraries and the property of charitable institutions. *It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products;* it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness or not allow them. All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the state legislature, or the people of the state in framing their Constitution. But clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition. It would, however, be im-

> practicable and unwise to attempt to lay down any general rule or definition on the subject, that would include all cases. They must be decided as they arise. We think that we are safe in saying that the Fourteenth Amendment was not intended to compel the state to adopt *an iron rule of equal taxation,* * * *"

Discrimination or difference in taxation of business conducted by a corporation and the same business when conducted by partnership or individual, has been sustained.

> Flint vs. Stone Tracy Co., 220 U. S. 107, 55 L. ed. 389.

A statute forbidding operation of cotton gins by corporations manufacturing oil or meal was held not an arbitrary classification, the Court saying:

> "Every state of facts sufficient to sustain such classification which can be reasonably conceived as having existed when the law was enacted will be assumed." Crescent Oil Company vs. Miss., 257 U. S. 129, 66 L. Ed. 166.

The method of assessing railway corporations may be different from that of assessing other corporations and such assessment may be by different assessing bodies.

> Ky. Railway Tax Cases, 115 U. S. 321, 29 L. ed. 414, Southern Railway vs. Watts, 260 U. S. 519, 67 L. ed. 375.
>
> "A state may without violating the Fourteenth Amendment confine the recovery of back taxes to those due from corporations."
>
> Fort Smith Lumber Co. vs. Ark., 251 U. S. 532, 64 L. ed. 396.

Assessing bonds and other securities of corporations at their par value, while other securities were assessed at their real value permitted.

> Bell's Gap Ry. Co. v. Pa., 134 U. S. 232, 33 L. ed., 892.

In Clark v. Titusville, 184 U. S. 329, 46 L. ed., 569, the Court sustained an ordinance of the city imposing a license tax on merchants by which they were divided into classes according to the amount of their sales, each class including those whose sales ranged between a certain minimum and maximum amount, although the result was to make persons in different classes pay different rates, and to make those in the same class pay at a different rate if the amounts of their sales differed.

The use of trading stamps in selling goods justifies the imposition of license tax upon those so using the trading stamps, when the business not using such stamps not so taxed, sustained.

Rast v. Van Deman & L. Co., 240 U. S. 342, 60 L. ed., 679;
Tanner v. Little, 240 U. S. 369, 60 L. ed., 691.

In Singer Sewing Machine Co. v. Brickell 233 U. S. 304, 58 L. ed., 974, a license tax on the business of selling sewing machines was sustained, although merchants selling such machines at a located place of business were exempt.

In Central Lumber Co. v. S. Dakota, 226 U. S. 157, 57 L. ed., 164, an act was held to be constitutional which affected only those selling goods in two or more places in the State, and did not affect persons selling goods in less than two places.

A license tax upon a laundry business was sustained, though it exempted steam laundries and women engaged in the business where not more than two women were employed.

Quong Wing v. Kirkendall, 223 U. S. 59, 56 L. ed. 350.

A state may tax anthracite coal when ready for the market without taxing bituminous coal at the same time.

Heisler v. Colliery Co., 260 U. S. 245, 67 L. ed., 237.

A state may levy an occupation tax on the mining of ore without levying it on other mining, while at the same time exempting contractors who strip off the old burden of soil, and all owners and lessees who do extensive development work without striking the ore.

Oliver Iron Mining Co. v. Lord, 262 U. S. 172, 67 L. ed., 930.

A tax imposed upon ore mines is not unconstitutional because not extended to quarries, forests or other property.

Lake Superior Consolidated Iron Mines v. Lord, 271 U. S. 577, 70 L. ed., 1093.

The Court sustained a workmen's compensation act which excluded from its operation an industry which did not employ four or more workmen or operatives regularly in the same business or in or about the same establishment.

Ward v. Krinsky, 259 U. S. 503, 66 L. ed., 1033.

"Any classification is permissible which has a reasonable relation to some permitted end of governmental action."

It is not necessary that the basis of the classification be deducible from the nature of the things classified. It is enough, for instance, if the classification is reasonably found in the purposes and policies of taxation.

Watson v. State Comptroller, 254 U. S. 122, 65 L. ed., 170.

"The Fourteenth Amendment is not a pedagogical requirement of the impractical. The equal protection of the laws does not mean that all occupations that are called by the same name must be treated in the same way. The power of the State may be determined by degrees of evil or exercised in cases where detriment is specially experienced."

Dominion Hotel v. Arizona, 249 U. S. 265, 63 L. ed., 597.

The applicable rule was thus stated by the Chief Justice of this Court in Ohio Oil Company vs. Conway, 281 U. S. 146, at page 159:

> "The applicable principles are familiar. The states have a wide discretion in the imposition of taxes. When dealing with their proper domestic concerns, and not trenching upon the prerogatives of the national government or violating the guarantees of the Federal Constitution, the states have the attribute of sovereign powers in devising their fiscal systems to insure revenue and foster their local interests. The states, in the exercise of their taxing power, as with respect to the exertion of other powers, are subject to the requirements of the due process and the equal protection clauses of the Fourteenth Amendment, but that Amendment imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to schemes of taxation. The state may tax real and personal property in a different manner. *It may grant exemptions.* The state is not limited to *ad valorem* taxation. It may impose different specific taxes upon different trades and professions and may vary the rates of excise upon various products. *In levying such taxes, the state is not required to resort to close distinctions or to maintain a precise, scientific uniformity with reference to composition, use or value.* To hold otherwise would be to subject the essential taxing power of the state to an intolerable supervision, hostile to the basic principles of our Government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to assure."

We respectfully submit that the effect of these decisions is to remove any Federal question which might arise by virtue of the exemption of these species of property declared by Federal Courts to be competing moneyed capital

within the meaning of Section 5219 of the Revised Statutes. The State of Alabama had a right to make classifications and exempt property thus classified. The Supreme Court of Alabama has held that such classifications are reasonable and that in making such classifications the Legislature did not violate the equality clause of the State Constitution. It is submitted that under the numerous cases heretofore cited and others which we have not adverted to, these classifications are reasonable under the Fourteenth Amendment of the Federal Constitution. Therefore in taxing the shares of state banks and failing to tax mortgages, mortgage loan companies, and building and loan associations, the State did not violate either its own Constitution nor did it violate the equal protection clause of the Fourteenth Amendment. Classification is a legislative prerogative. It cannot be said that such classifications are unreasonable. The Supreme Court of Alabama has held that they were not. Therefore so far as the exemption of these species of property from ad valoreum taxation, the Petitioner cannot complain.

We respectfully submit that apart from the question of national banks, the Petitioner has been denied no constitutional right.

THE FAILURE TO LEVY A VALID TAX AGAINST NATIONAL BANK SHARES DOES NOT INVALIDATE THE TAXATION OF PETITIONER'S SHARES.

The question therefore arises whether the State's failure to tax the shares of national banks because of the restrictive provisions of Section 5219 destroys its right to tax the shares of state banks.

As pointed out, the taxation of the shares of state banks is not invalid either under the State or Federal Constitutions because certain species of property commonly called moneyed capital are exempt from ad valorem taxation in Alabama. We submit this is clear. The State Courts are not bound to accept the Federal definition of moneyed capi-

tal as applied to Section 5219 of the Revised Statutes. Moreover, they can divide and subdivide for purposes of classification such forms of property and exempt such as the Legislature deems fit so long as such classifications are not purely arbitrary and without semblance of reason. This power belongs to the State inherently. The Fourteenth Amendment does not seek to make the State conform to any certain system. It only guarantees equal protection. In making classifications as stated the power of the State is unlimited except those purely arbitrary.

The exemption of certain forms of property declared by the Federal Courts to be moneyed capital in competition with national banks within the meaning of Section 5219 of the Revised Statutes has rendered the taxation of the shares of certain national banks invalid because of the limitations of said Section 5219. The taxation of national banks if full power to tax were given, would not, we submit, be void under the Fourteenth Amendment despite these exemptions. The invalidity arises from the restrictive provisions of Section 5219 and not from the Fourteenth Amendment.

We respectfully submit that in order for this Court to declare that the taxation of the shares of this Petitioner is invalid, this Court must force on the State of Alabama the definition of moneyed capital as applied by the Federal Courts to Section 5219 and declare that such definition is controlling in deciding whether the Fourteenth Amendment to the Federal Constitution is transgressed.

National banks are instrumentalities of the United States and as such are exempt from all forms of State taxation unless Congress expressly permits.

> "Congress may prohibit any taxation of national banks by states, cities, counties or towns, and its mere silence on the subject if it were silent would be a prohibition."

First National Bank vs. Richmond, 13 Supreme Court Reporter, 1044, 149 U. S. 769, dismissing appeal 39 Fed. 309.

"The respective states would be wholly without power to levy any tax either direct or indirect upon the national banks, and property assets, or franchises were it not for the permissive legislation of Congress."

Citizens Savings Bank vs. Owensboro, 173 U. S. 636, 19 Supreme Court Reporter 530, 43 L. Ed. 840.

Therefore a national banks is not a subject over which the State has the power of taxation either inherent or otherwise except at the caprice of Congress.

Congress has permitted the states to exercise the power of taxation in the manner provided by Section 5219. So far as these provisions are of effect in Alabama and pertinent to this case, we call attention to the following:

The State may tax the real estate of national banks. This taxation has not been complained of and is, we presume, valid under the Fourteenth Amendment notwithstanding the fact that certain real estate such as that used for school purposes is exempt. Section 5219 is silent as to personal property, hence the states have no power to tax personal property belonging to a national bank.

The State of Alabama does tax the personal property of state banks and in doing so violates no provision of the State Constitution, and it is submitted does not violate the Fourteenth Amendment despite its failure to tax the personal property of national banks. The Fourteenth Amendment does not force the State to exempt property because similar property belongs to a Federal instrumentality and entirely exempt.

The State having received no grant of power from Congress to tax the personal property of national banks, the discrimination against the state banks and other persons

or corporations whose personal property is taxed, is not a violation of the uniformity clause of the State Constitution because those provisions apply only to those subjects of taxation which the State has inherent power and not to property exempt by its own Constitution, by the Federal Constitution or by law.

Neither, we submit, can the failure to tax personal property of national banks violate the Fourteenth Amendment. The Fourteenth Amendment certainly does not guarantee that the State shall tax property subject to those laws in the same manner it taxes property and agencies of the United States or other property not subject to its laws. Such an effect would be an absurdity.

Under Section 5219 of the Revised Statutes, the State of Alabama can tax the shares of national banks in a limited manner. The State of Alabama has not met those limitations, the effect thereof being to exempt the shares of national banks. It is submitted if national banks shares had been entirely exempted either by Congress or by the State of Alabama, such an exemption would not have rendered void the taxation of the shares of state banks. The effect of such action would be the same as in the case of tangible personal property. The Fourteenth Amendment does not require that the states in taxing their own subjects shall be required to exercise whatever limited power Congress may give to tax Federal instrumentalities and to tax its own creatures accordingly. Therefore, if the State of Alabama had declined to attempt the taxation of the shares of national banks entirely, no discrimination could have been complained of.

Does and can the exemption of national banks by indirection have any different effect? We submit it does not.

A national bank is a Federal instrumentality. As such it and its shares are withdrawn completely from the power of the State to tax. Congress may grant such power, but the power is not inherent or plenary, but is a granted or delegated power which can be withdrawn at any moment.

Congress has granted to the states the right to tax the shares of national banks upon certain prescribed conditions. The State of Alabama has failed or refused to comply with those conditions. The resulting effect is to exempt national bank shares from taxation as fully as if the Legislature by specific enactment had declared them so.

Can such an exemption of a subject of taxation, the right to tax which is not inherent but is granted and delegated, constitute a violation of the uniformity clause of the State Constitution or the Fourteenth Amendment?

To the first question, the Supreme Court of Alabama says "no." The decision declares unequivocally that Section 217 of the State Constitution applies to those subjects of taxation over which the State has inherent power and not to those subjects where the power is merely delegated.

Can the Fourteenth Amendment be given a different meaning? Can it be said that if the State of Alabama refuses entirely to tax the shares of national banks, its failure to so do does not discriminate against the shares of state banks, while if the State enacts a statute applicable to both except that other provisions of the same general act render invalid and in effect exempt national banks, make a discrimination against state banks in violation of the equal protection clause of the Fourteenth Amendment?

Such a position, we submit, is illogical. The case is not different, than if the Legislature had said the shares of all banks except national banks shall be taxed in the manner provided. If this were true no discrimination would result. Can this Court declare the situation different because under the provisions of Section 6 of the Revenue Act of 1923 taken alone national banks would be taxed, when the Court judicially knows that in the same general law are other provisions rendering the taxation of national banks unavailing? Does not the Court know, and did not the Legislature know that in enacting Section 6 along with the other provisions exempting mortgage companies and intangibles it was exempting national bank shares?

We submit the judgment of the Supreme Court is sound and ought to be affirmed. It would indeed be a far cry and a dangerous principle to declare that the Fourteenth Amendment limits the power of the State to tax its own subjects in the manner and to the extent Congress permits the taxation of Federal instrumentalities.

If it be true that the State can escape such effect by refusing entirely to exercise the power given by Congress, then can any different effect result when the State attempts and fails?

There is a general statute in Alabama taxing the property of hydroelectric plants. There is no exception of government owned plants, yet the Muscle Shoals plant, exactly the same species of property, is exempt, just as clearly as if a specific exception had been written therein. Neither the State or Federal Constitutions are violated thereby, for the guarantee of equal protection does not extend to those subjects over which the Legislature has no power. Can the failure, either by specific exception or otherwise, to exercise a limited power when granted destroy the State's power over those subjects, over which its power is inherent and plenary?

We submit the difference, if any, is one of degree, not of kind.

If Petitioner is correct that the failure to tax national bank shares renders invalid the taxation of state bank shares, this situation inevitably follows.

The State can not tax national banks because other moneyed capital in competition is taxed at a lower rate, the State cannot tax State banks because competing national banks are not taxed. Such moneyed capital cannot be taxed at all (presumably if congressional action is to be the measure) because competing state and national banks are not taxed. In other words the circle narrows and descends until everybody is exempt. This is not an absurd argument, if Petitioner's construction were correct.

Petitioner's brief relies for supporting Alabama authority on State Bank v. Board of Revenue, 91 Ala. 217. It is needless to point out that this decision invalidated a State statute which directly favored national banks over state banks. This was an Act of the State and no Federal statute or question was involved. In this case though, the Court decided that the Legislature classified bank shares and money and credits differently, the Court saying:

> "The words next succeeding declare what the Legislature intended to include in the words moneyed capital; *money loaned, solvent credits, credits of value. Bank shares* are *neither money loaned, solvent credits, nor credits of value; nor are the latter bank shares. They are, each of them, a species, and only a species, of the generic class, moneyed capital.* Hence, if we interpret, by itself, the language of the statute we have copied, we would be forced to hold that the Legislature did not intend to include bank shares in the class they declared should have the right to deduct the amount of their indebtedness, and pay taxes only on the residue."

It is to be noted that the Legislature in the present law classified or enumerated money and credits, separately from bank shares as subjects for taxation or exemption.

However the State Bank v. Board of Revenue was before the Supreme Court of Alabama in the present case, and we submit any persuasive force it might have is answered by this latest pronouncement of the Supreme Court of Alabama.

Petitioner on page 25 et seq. of its brief takes the Supreme Court of Alabama to task for use of the word "delegated" powers. He goes back to the principles upon which this Government was founded and re-states those elementary principles which the Court of course knows without any re-statement; that the Federal Government is a Government of delegated powers and not of inherent powers;

that the states have inherent power over all subjects not surrendered to the Federal Government. Thus he argues that the Federal Government could not delegate to the states the right to tax national banks. Of course that was the original conception of Government and as a philosophical doctrine it is still subscribed to. Since the great political revolution of 1865-1870, we fear it is a principle largely functus officio.

However, to argue that because the word "delegate" is not absolutely technically correct, and that the correctness of the decision of the majority is thereby affected seems to give an import to those words, both technical and strained. Whatever may be the technical correctness of the use of the word "delegate," the fact is that states have no power whatsoever to tax national banks except as allowed by Congress. Whether to call this a delegation of power, a permission of power, a conferring of power, seems unimportant. Whatever right, power, jurisdiction, or authority which the states can exercise is by the gift of the Federal Congress. If the states had any inherent right it was surrendered at the formation of the Constitution or at least it died with the case of McCulloch vs. Maryland.

Hence as we see it, whether the power be termed a permission, a delegation or a grant is unimportant. The fact remains that this is property within the State over which the State in itself has no power of taxation, that Congress for a temporary period of time has granted the states power to tax this property under certain conditions. This power Congress can take away at any moment leaving it absolutely exempt. The taxation power and the uniformity provisions of the State Constitution are not temporary things. We submit that the decision of the majority holding that these provisions applied to those subjects of taxation as to which the State is clothed with inherent and unlimited sovereignty is fundamentally sound and logical.

Otherwise we have this situation. Congress today permits the taxation of the shares of national banks in such

a manner according to Petitioner's contention as to, under our laws, invalidate the taxation of state banks. Tomorrow Congress destroys entirely or repeals entirely Section 5219 leaving the states powerless to tax national banks, real property, shares or anything else. Thereupon the taxation of state banks is validated. There being no conflict with national banks, there is no discrimination against the state banks. This is nothing more nor less than congressional legislation on local matters.

GENERAL ARGUMENT

Petitioner cites on page 19 of his brief numerous decisions of this Court in support of its contention.

Of these, the recent case of Central State Bank vs. Bennett, 284 U. S. 239, is we submit the only case that can be taken as authority in the present case.

In this case, it appears that Iowa had a classified property tax. That state and national bank shares and moneyed capital were separately classified for purposes of taxation. That the shares of competing corporations were assessed at the same rate and in the same class as bank shares, but the Auditor in making up the tax list wrongfully extended them as money and credits under a different classification and a definitely different rate.

As to national banks, Section 5219 was violated. That is not here before us.

As to the state banks this Court said:

> "Both petitioners claim that they have been subject to intentional systematic discrimination in violation of the Fourteenth Amendment. The Federal right of the Central State Bank rests wholly upon that clause. It is assumed that there was such inequality of treatment as the Constitution forbids."

We respectfully submit the facts are so materially different that the decision in this case cannot be controlling.

First, there is no classified property tax in the State of Alabama. All taxable property must be taxed at the same rate. This rate is fixed by the Constitution. This constitutional provision does not forbid exemptions.

Authorities supra.

Under the Fourteenth Amendment the State may grant exemptions.

Therefore in exempting the species of property complained of the Legislature was not violating either the Constitution of Alabama or the Federal Constitution.

We believe it a reasonable assumption to say the State can make its own classifications for purposes of exemption, and unless wholly arbitrary this Court is bound thereby.

If it chose to exempt those species defined by the Federal Courts as competing capital within the meaning of Section 5219, it did not thereby deny equal protection to this Petitioner.

The effect though of such exemptions is to exempt national bank shares. This exemption arises because of lack of power over national banks.

This question, we submit, has been correctly answered by the Supreme Court of Alabama. The guarantees of the State and we submit, the Federal Constitutions apply to those subjects over which the State has inherent power and not a mere granted or delegated power.

Otherwise this situation perforce arises.

The State must tax all taxable property at the same rate. If it taxed Federal instrumentalities in any way, then it perforce must tax all its subjects of taxation in the same manner. Under the State Constitution, if it taxes at all, it must tax uniformly. The Highest Court of the State

has said this equality clause did not apply to property over which the State has not inherent power.

Can this Court go further and declare that the Fourteenth Amendment forbids exemptions, and force the State to conform, not to the equality guaranteed by its own laws, but to Congressional ideas and restrictions?

If the failure to tax national bank shares invalidates the taxation of state bank shares, what will be the effect on other forms of property taxation. Sections 211 and 217 provide for the taxation of all taxable property at the same rate. State bank shares are taxable property. If untaxed or taxed at a lower rate, can not it seriously affect the State's power to tax other forms of property at ad valorem rates? Clearly if there are any forms of a similar nature they can complain.

We submit, Petitioner's case depends on whether this Court says that the granting of the exemptions complained of, is a denial of the equal protection clause of the Fourteenth Amendment .

We submit that there is no proper Federal question involved. The Supreme Court of Alabama is the proper authority, to decide whether the granting of the exemptions complained of, makes an unlawful discrimination against Petitioner. It has decided contrary to Petitioner's claim. The exemption of national bank shares incidentally results from such exercise of the Legislature's constitutional prerogative. The case hinges though, not on this fact, but on the primary power of the State to make these exemptions. If such action were constitutional, the mere fact that because of Section 5219, national bank shares escape, cannot give the Petitioner a right to invoke the Fourteenth Amendment which would not otherwise exist.

As we understand the decision of this Court in Central Bank vs. Bennett, it rests on the unequal taxation of state bank shares and other property classified and declared by statute to be in the same class and subject to the same rate.

The decision was not based on the failure to tax national bank shares, or at least there is no specific language so holding.

The decision based on the findings or assumptions of the Iowa Court, cannot we submit, be in any way conclusive in the present case. The Supreme Court of Alabama has decided that these exemptions constituted no denial of constitutional rights.

Certain Federal cases cited by Petitioner involved the question that systematic undervaluation of other property was asserted to violate the equal protection clause of the Fourteenth Amendment. No question of valuation is here involved and the cases are not applicable. Others involved violations of Section 5219. They have no bearing on the present case.

The several decisions of other State Courts cited are not authority. The Supreme Court of Alabama having decided the State question here involved.

CONCLUSION.

In conclusion we respectfully submit that the real and sole question here involved is this: Did the Legislature by differently classifying mortgage companies, building and loan associations, industrial loan companies, mortgages and money and credits from state bank stock, and exempting them from ad valorem taxation while subjecting the shares of state banks to such taxation violate the Fourteenth Amendment to the Constitution of the United States? In answer to this we submit:

First. The power to classify is a legislative power and cannot be overturned by the Courts unless such classification is purely arbitrary.

Authorities supra.

> "The constitutionality of a law is not to be determined on a question of fact to be ascertained by the court. If under any possible state of facts an act would be constitutional, the courts are bound to presume that such facts exist."

6 R. C. L. 112.

> "Whenever the determination by the Legislature is in reference to opinion or debatable questions concerning which there is a reasonable ground for difference of opinion, and there is probable basis for sustaining the conclusion reached, its findings are not subject to judicial review."

6 R. C. L. 114, Section 113.

In Powell vs. Pennsylvania, 127 U. S. 678, 32 L. ed. 253, it was held (quoting from the headnote):

> "The legislative determination of such question is conclusive upon the courts, unless it appears that upon the face of the statute, or from the facts of which the courts must take judicial cognizance, that the statute infringes rights secured by fundamental law."

Second. The Legislature did separately classify mortgages and solvent credits. The exemption appears in Section 2 of the Acts of 1923 along with numerous other exemptions.

Third. The Legislature separately classified mortgage companies, building and loan associations, and industrial loan companies. This appears from their inclusion in and exception from the Act of 1927 levying a tax on the shares of general corporations.

Fourth. These classifications are reasonable. There are many and substantial differences between these forms of

property and bank stock. There are many differences in the power of and the manner and nature of business done by mortgage companies, building and loan associations, and industrial loan companies, and those powers of and business done by banks.

Fifth. Under the cases heretofore cited these classifications are not unreasonable or arbitrary.

Sixth. The Supreme Court of Alabama has upheld them.

Seventh. The State can make exemptions without violating the Fourteenth Amendment.

Ohio Oil Company vs. Conway, supra.

Therefore having made classifications not purely arbitrary and exempted the species of property so classified the constitutional rights of this Petitioner have not been denied.

The failure to levy a valid tax on an instrumentality of the United States cannot, we submit, render invalid a tax otherwise valid and constitutional.

We respectfully submit there is no proper Federal question and the writ of certiorari should be denied.

Respectfully submitted,

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CHARLES ELMORE

Supreme Court of the United States

OCTOBER TERM, 1932.

NO. 346.

UNION BANK & TRUST COMPANY,
PETITIONER,

VS.

R. C. PHELPS, Individually and as Tax Collector of Montgomery County, Alabama.
RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALABAMA.

BRIEF OF RESPONDENT.

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RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALABAMA.

BRIEF OF RESPONDENT.

STATEMENT OF THE CASE.

Petitioner's statement of the case found in its brief at pages 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, contains a fair presentation of the facts in the case. We deem it unnecessary to comment on the same except to emphasize the fact that respondent specifically denied in his answer and no where admitted that the arrangement of State and National Bank shares as appears in Section 6 of the 1923 Revenue Act (General Acts, 1923, p. 152, Section 6)

is a classification for taxation purposes but claims that it is a method of valuation and assessment. The further fact is emphasized that there is no classified property tax in Alabama and that any benefit the "so called competing moneyed capital" may derive is by virtue of certain exemptions declared to be legal and that the taxation of such property is not at a *different rate,* but only the burden is less.

PETITIONER'S SPECIFICATION OF ERRORS.

Petitioner's specification of errors alleges that the equal protection clause of the Fourteenth Amendment is violated by the decision of the Supreme Court of Alabama for two reasons, to-wit:

1. Because other moneyed capital coming into competition with Petitioner is exempt or bears a lesser burden of taxation than do the shares of Petitioner.

2. Because the shares of certain competing National Banks are not taxed, by reason of the failure of the State to meet the conditions imposed by Section 5219 of the Revised Statutes as amended.

Petitioner's argument is based on these hypotheses:

1. That Section 6 of the Revenue Act of 1923 is a classification of State and National Bank shares into a single class.

2. That the failure to tax "other moneyed capital in competition" with Petitioner constitutes a violation of the equal protection clause of the Fourteenth Amendment.

3. That because of the failure to levy a valid tax against the shares of National Banks, the taxation of Petitioner's shares is in violation of the Fourteenth Amendment.

RESPONDENT'S ANSWER TO SUCH SPECIFICATIONS.

Respondent in answer to these propositions says:

(a) That the arrangement of State and National Bank shares as appears in Section 6 of the Revenue Act of 1923, is not a classification for taxation purposes but is a convenient method provided by the statute for the valuation and assessment of such shares.

(b) That the exemption of the species of property, generally referred to as moneyed capital, from taxation is not such a discrimination against Petitioner as to constitute a violation of the Fourteenth Amendment. That while these forms of property have been declared to be "competitive moneyed capital" within the meaning of Section 5219 of the Revised Statutes of the United States, yet their classification and exemption from taxation by the Legislature of Alabama was a reasonable classification and caused no unconstitutional denial of Petitioner's claim to equal rights.

(c) That the failure to levy a valid tax against the shares of National Banks is not in violation of the Fourteenth Amendment, because such banks are instrumentalities of the United States, and the Fourteenth Amendment does not require the State in taxing its own citizens, or corporations, who have life by its fiat, to tax them in conformity with the power it may exercise over Federal agencies.

ARGUMENT.

Section 211 of the Constitution of Alabama of 1901 provides:

"All taxes levied on property in this state shall be assessed in exact proportion to the value of such property, but no tax shall be assessed upon any debt for rent or hire of real or personal property, while owned by the landlord or hirer during the current year of such rental or hire, if such real or personal property be assessed at its full value."

Section 217 of the Constitution of 1901 provides:

"The property of private corporations, associations, and individuals of this state shall forever be taxed at the same rate; provided, this section shall not apply to institutions devoted exclusively to religious, educational, or charitable purposes."

These Sections forbid, it will be seen, the arrangement of property into different classes and the taxation of such classes at different rates. There is not therefore, and cannot exist in the State of Alabama a classified property tax as found in the Constitutions of many of the states.

However the Supreme Court of Alabama has construed the guarantee contained in these two provisions of the Constitution to apply to *taxable property*. We refer briefly to some of the cases:

"The State has the power to exempt any class or item of property from taxation, and to declare what property shall be the subject of ad valorem or annual property taxation."

State vs. Birmingham Southern R. R. Co., 62 So. 77, 182 Ala. 475;
W. U. Telegraph Co. vs. State Board, 80 Ala. 273;
Phoenix etc. Co. vs. Montgomery, 117 Ala. 631;
Kidd vs. State, 188 U. S. 730.

"The power to classify is necessary to avoid oppressive results and is subject only to the limitations imposed by the State and Federal Constitutions. These limitations prohibit only those classifications which can be supported on no rational hypothesis."

W. U. Telegraph Co. vs. State Board, supra.

"Sections 211 and 217 of the Constitution of Alabama are not to be construed to prohibit exemptions from taxation nor reasonable classifications, nor to require the taxation of all property at precisely the same rate."

M. & G. R. R. vs. Peebles, 47 Ala. 317;
Moog vs. Randolph, 77 Ala. 597;
Phoenix Co. vs. State, 118 Ala. 143.

In the present case the Court said:

"Upon the question of taxation, the Legislature of this State had the power to make exemptions and classifications free from interference by the courts unless there results inequality, not only oppressive in its operation, but so glaring as that it can be judicially declared to be founded on arbitrary and capricious principles, without the just semblance of reason. Subject to this limitation the legislative power to select proper subjects of taxation and to classify them upon principles which to them seem just, cannot be circumscribed by the courts. There must be, of necessity, left a liberal scope for the free exercise of this presumably wise discretion."

Petitioner's brief after quoting at length from Moog vs. Randolph, 77 Ala. 597, Phoenix Carpet Co. vs. The State, 118 Ala. 143, State vs. Birmingham Southern R. R. Co., 182 Ala. 475, contains the following statement:

"The effect of the decisions is that all subjects of property upon which the State levies an ad valorem tax must be taxed at the same rate and accorded equality of treatment, that the Legislature may select the subjects of taxation and accordingly may exempt from taxation such classes of property as it may determine, provided that its classifications for such exemptions are not 'arbitrary, capricious or without the semblance of reason.'"

By this statement Petitioner admits that there is no classified property tax in the State of Alabama in the usual meaning of the term, but that if property is declared to be taxable by the Legislature for ad valorem purposes all such *taxable property* must be taxed at the same rate. It follows therefore that if the Legislature fails to list as a subject of taxation certain property such property is thereby exempted.

It can likewise classify certain species of property and exempt such species from ad valorem taxation. It can not, however, tax one item or one species at one rate and another item or species at a different rate.

Therefore the first inquiry is, did the Legislature in exempting mortgages upon the payment of the privilege recording tax, the exemption of stocks and bonds of foreign corporations upon the payment of a similar recording tax, the exemption of money on deposit, solvent credits, and the shares of building and loan associations, mortgage companies or corporations making loans on real estate or purchasing mortgages or mortgage notes on real estate, and industrial loan companies, make a reasonable exercise of its power to classify and exempt.

THE EXEMPTIONS WERE LEGAL AND PETITIONER'S RIGHT TO EQUAL PROTECTION WAS NOT THEREBY DENIED.

It is respectfully submitted that these classifications are legal and reasonable.

The exemption of mortgages upon which the privilege recording tax has been paid has been upheld.

State vs. Alabama Fuel & Iron Co., 188 Ala. 487.

The exemption of securities of foreign corporations upon the payment of a recording privilege tax has been upheld.

Lee vs. State Tax Commission, 123 So. p. 6.

Solvent credits have been exempted from ad valorem taxation since 1915 and the reasonableness of this exemption has been sustained.

Barnes vs. Moragne, 145 Ala. 313.

The exemptions added by the Legislature of 1927, applying to the shares of building and loan associations, real estate loan companies, mortgage companies and industrial loan companies have not been before the courts except in this proceeding

It is respectfully submitted that none of these exemptions are so unreasonable, capricious or arbitrary as to be in themselves void or to constitute a denial of Petitioner's equal rights as guaranteed by the Fourteenth Amendment.

This Court has adopted with respect to the Fourteenth Amendment the rule as to classifications, similar to that laid down by the Supreme Court of Alabama in construing its own Constitution except that the Fourteenth Amendment does not deny to the states the right by tax-

ation to favor certain classes of business, if the State in doing so, taxes all in the same class alike and such classification is not wholly unreasonable and arbitrary.

The rule of classification has thus been laid down by this Court.

The taxing power of the State is one of the highest attributes of sovereignty, essential to its continued existence, and may be exercised without limitation on all property, trades and business carried on within its boundaries unless prohibited by the State or Federal Constitutions.

Railroad Company v. Peniston, 85 U. S. 5, at p. 29;
Royall v. Virginia, 116 U. S. 592, at p. 597.

In the exercise of its taxing power, the state, in the discretion of its legislature, may levy a privilege or occupation tax on *all occupations or business,* or it may *select* for taxation certain classes and leave the *others untaxed.*

Armour Packing Co. v. Lacy, 200 U. S. 226, at p. 235;
Southwestern Oil Co. vs. Texas, 217 U. S. 114, at pp. 124, 125 and 126;
Bell's Gap R. R. Co. v. Pennsylvania, 134 U. S. 232, at page 237;
American Sugar Refining Co. v. Louisiana, 179 U. S. 89, at page 94;
Hart Refineries v. Harmon, Treas., 49 Supreme Court Reporter, 188, at page 189.

In cases in which the Legislature selects certain classes for taxation, the classes so selected may be *further subdivided according to certain differences* without violating the *due process* and *equal protection* provisions of the Fourteenth Amendment to the Constitution of the United States, if the subdivisions are reasonable.

Cooley on Taxation (4th Ed.), Secs. 349-350;
Southwestern Oil Co. v. Texas, 217 U. S. 114, at p. 126;
Michigan Railroad Tax Cases, 188 Fed. 223, at p. 241;
Metropolitan Life Ins. Co. v. City of Paris, 138 Ky. 801, 129 S. W. 112.

In determining whether a classification for an occupation tax is discriminating, the motives or special reasons actuating the Legislature is of no concern to the court; neither is the wisdom of the classification of consequence. The determining factor lies in the answer to the question, does the burden fall alike upon all who are in substantially the same situation?

Cooley on Taxation (4th Ed.), Section 350;
Southwestern Oil Co. v. Texas, 217 U. S. 114, at p. 126;
Oliver Iron Co. v. Lord, 262 U. S. 172, at p. 179;
Michigan Central R. R. Co. v. Powers, 201 U. S. 245, at p. 293;
Dane v. Jackson, 256 U. S. 589, at pp. 598-599;
Citizens Telephone Co. v. Fuller, 229 U. S. 322, at pp. 329-331;
McLean v. Arkansas, 211 U. S. 539, at p. 547;
Hart Refineries v. Harmon, Treas., supra.

A classification of occupations for taxation made by the Legislature of a state which is not wholly unreasonable and arbitrary, and which is uniform in its operation on all members to which it is *made applicable,* is not violative of the equal protection guaranteed by the Federal Constitution.

Consumers' League v. Colorado, etc. R. Co., 125 Pac. 577;

Chicago etc. R. Co. v. Arkansas, 219 U. S. 453, 466;
W. W. Cargill Co. v. Minnesota, 180 U. S. 453, 469.

The State is sovereign mistress of her own policy in establishing classes for the purpose of raising revenue by taxation and such classification will not be set aside except where there is no rational basis for the classification.

Ex parte Thornton, 12 Fed. 538;
Singer Sewing Mach. Co. v. Brickell, 233 U. S. 304.

The subjects and methods of taxation are legislative matters, and can not be disturbed so long as the method prescribed is applicable alike to all within the prescribed class. Corporations, individuals, wholesale and retail dealers, domestic and foreign corporations may be separately classified and taxed differently, so long as all in the constituted classes are treated alike.

Kersey v. City of Terre Haute, 161 Ind. 471, at p. 472 et seq.;
State ex rel Lewis, et al v. Smith, Aud., 158 Ind. 543, at p. 546;
Gafill v. Bracken, Aud., 195 Ind. 551, at p. 560;
State v. Hammond Pkg. Co., 233 U. S. 331.

In Bell's Gap Railroad Company v. Pennsylvania, 134 U. S. 232, this Court said:

"* * * The provision in the Fourteenth Amendment, that no state shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a state from adjusting its system of taxation in all proper and reasonable ways. *It may, if it chooses, exempt certain classes of property from any taxation at all,* such as churches, libraries and the property of charitable institutions. *It*

may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, *and not tax securities for payment of money;* it may allow deductions for indebtedness or not allow them. All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the state legislature, or the people of the state in framing their Constitution. But clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our government, might be obnoxious to the constitutional prohibition. It would, however, be impracticable and unwise to attempt to lay down any general rule or definition on the subject, that would include all cases. They must be decided as they arise. We think that we are safe in saying that the Fourteenth Amendment was not intended to compel the state to adopt *an iron rule of equal taxation,* * *"

Discrimination or difference in taxation of business conducted by a corporation and the same business when conducted by partnership or individual, has been sustained.

Flint vs. Stone Tracy Co., 220 U. S. 107, 55 L. Ed. 389.

A statute forbidding operation of cotton gins by corporations manufacturing oil or meal was held not an arbitrary classification, the Court saying:

"Every state of facts sufficient to sustain such classification which can be reasonably conceived as

having existed when the law was enacted will be assumed.'

Crescent Oil Company vs. Miss., 257 U. S. 129, 66 L. Ed. 166.

The method of assessing railway corporations may be different from that of assessing other corporations and such assessment may be by different assessing bodies.

Ky. Railway Tax Cases, 115 U. S. 321, 29 L. Ed. 414;
Southern Railway v. Watts, 260 U. S. 519, 67 L. Ed. 375.

"A state may without violating the Fourteenth Amendment confine the recovery of back taxes to those due from corporations."

Fort Smith Lumber Co. v. Ark., 251 U. S. 532, 64 L. Ed. 396.

Assessing bonds and other securities of corporations at their par value, while other securities were assessed at their real value permitted.

Bell's Gap Ry. Co. v. Pa., 134 U. S. 232, 33 L. Ed. 892.

In Clark v Titusville, 184 U. S. 329, 46 L. Ed., 569, the Court sustained an ordinance of the city imposing a license tax on merchants by which they were divided into classes according to the amount of their sales, each class including those whose sales ranged between a certain minimum and maximum amount, although the result was to make persons in different classes pay different rates, and

to make those in the same class pay at a different rate if the amounts of their sales differed.

The use of trading stamps in selling goods justifies the imposition of license tax upon those so using the trading stamps, when the business not using such stamps not so taxed, sustained.

Rast v Van Deman & L. Co., 240 U. S., 342, 60 L. Ed., 679;
Tanner v. Little, 240 U. S. 369, 60 L. Ed., 691.

In Singer Sewing Machine Co. v. Brickell, 233 U. S. 304, 58 L. Ed., 974, a license tax on the business of selling sewing machines was sustained, although merchants selling such machines at a located place of business were exempt.

In Central Lumber Co. v. S. Dakota, 226 U. S. 157, 57 L. Ed., 164, an act was held to be constitutional which affected only those selling goods in two or more places in the State, and did not affect persons selling goods in less than two places.

A license tax upon a laundry business was sustained, though it exempted steam laundries and women engaged in the business where not more than two women were employed.

Quong-Wing v. Kirkendall, 223 U. S. 59, 56 L. Ed., 350.

A state may tax anthracite coal when ready for the market without taxing bituminous coal at the same time.

Heisler v. Colliery Co., 260 U. S. 245, 67 L. Ed., 237.

A state may levy an occupation tax on the mining of ore without levying it on other mining, while at the same time exempting contractors who strip off the old burden of soil, and all owners and lessees who do extensive development work without striking the ore.

Oliver Iron Mining Co. v. Lord, 262 U. S. 172, 67 L. Ed., 930.

A tax imposed upon ore mines is not unconstitutional because not extended to quarries, forests or other property.

Lake Superior Consolidated Iron Mines v. Lord, 271 U. S. 577, 70 L. Ed., 1093.

The Court sustained a workmen's compensation act which excluded from its operation an industry which did not employ four or more workmen or operatives regularly in the same business or in or about the same establishment.

Ward v. Krinsky, 259 U. S. 503, 66 L. Ed., 1033.

"Any classification is permissible which has a reasonable relation to some permitted end of governmental action."

It is not necessary that the basis of the classification be deducible from the nature of the things classified. It is enough, for instance, if the classification is reasonably found in the purposes and policies of taxation.

Watson v. State Comptroller, 254 U. S. 122, 65 L. Ed., 170.

"The Fourteenth Amendment is not a pedagogical requirement of the impractical. The equal protection of the laws does not mean that all occupations that are called by the same name must be treated in the same way. The power of the State may be determined by degrees of evil or exercised in cases where detriment is specially experienced."

Dominion Hotel v. Arizona, 249 U. S. 265, 63 L. Ed., 597.

The applicable rule was thus stated by the Chief Justice of this Court in Ohio Oil Company vs. Conway, 281 U. S. 146, at page 159:

"The applicable principles are familiar. The states have a wide discretion in the imposition of taxes. When dealing with their proper domestic concerns, and not trenching upon the prerogatives of the national government or violating the guarantees of the Federal Constitution, the states have the attribute of sovereign powers in devising their fiscal systems to insure revenue and foster their local interests. The states, in the exercise of their taxing power, as with respect to the exertion of other powers are subject to the requirements of the due process and the equal protection clauses of the Fourteenth Amendment, but that Amendment imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to schemes of taxation. The state may tax real and personal property in a different manner. *It may grant exemptions.* The state is not limited to *ad valorem* taxation. It may impose different specific taxes upon different trades and professions and may vary the rates of excise upon various products. *In levying such taxes, the state is not required to resort to close distinctions or to maintain a precise, scientific uniformity with reference to composition, use or value.* To hold otherwise would be to subject the essential taxing power of the state to an intoler-

able supervision, hostile to the basic principles of our Government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to assure."

In Farmers & Merchants Saving Bank vs. Minn., 232 U. S. 514, it was held that a statute providing for the registration of mortgages and their exemption from ad valorem tax, except when owned by savings banks did not violate the Fourteenth Amendment, such mortgages being used in determining the taxable surplus.—Bell's Gap R. R. Co. vs. Penn., supra, was quoted as authority.

We respectfully submit that under the foregoing authorities the exemption of the species of property complained of is not unreasonable or arbitrary, and does not deny to petitioner its constitutional rights. The business of insurance is entirely different from that of a bank. There are many and essential differences judicially known to the Court but whether known to the Court or not presumably before the Legislature between solvent credits, mortgages, money on deposit, and bank stock. Likewise the business of a building and loan association is distinctly and markedly different from that of a bank. A simple illustration is in the form of the shares of stock. Usually building and loan stock is of a withdrawable nature, having no permanency and few of the attributes of capital stock of other corporations.

Mortgage companies and industrial loan companies likewise conduct their busines in a manner essentially different from that of a bank. Their business generally speaking is limited to a particular form or class of security or commercial paper. The bank is regulated in a manner especially provided by law, there is a minimum capital for organization, it receives deposits both saving and commercial. It usually is a depository for the state and its sub-

divisions. Often times it acts in the capacity of executor or trustee. It lends on commercial paper and discounts the same. It may lend on real estate mortgages. It trades in stocks and bonds, and engages in many other forms of activities incidental or auxiliary thereto.

In truth the modern bank has been termed a financial department store. None of the companies, the exemption of which Petitioner declares to be in violation of his constitutional guaranty of equal rights enjoy the privileges nor are they qualified by law or equipped in fact to engage in the numerous activities as does the modern bank.

It is presumed that there were such facts before the Legislature as to make the classification legal.

> "Every state of facts sufficient to sustain such classification which can be reasonably conceived as having existed when the law was enacted will be assumed."
>
> Crescent Oil Co. vs. Miss., 257 U. S. 129.
>
> "The legislative determination of such question is conclusive upon the courts, unless it appears that upon the face of the statute, or from the facts of which the courts must take judicial cognizance, that the statute infringes rights secured by fundamental law."
>
> Powell vs. Penn., 127 U. S. 678. (quoting from headnote).

Petitioner is seeking we submit, to apply to the Fourteenth Amendment the restriction placed by Congress on the taxation of National Banks and as construed by this Court. The restriction of 5219 applies to competing moneyed capital. It is not pointed out that this Court

has any where held that competition is the criterion in determining the reasonableness of a classification under the Fourteenth Amendment. To the contrary, the cases above cited show many businesses which are actually competing and which are essentially the same, but this Court has upheld the right to classify and *further subdivide according to certain differences* without violating the equal protection provision of the Fourteenth Amendment.

We respectfully submit that the effect of these decisions is to remove any Federal question which might arise by virtue of the exemption of these species of property declared by Federal Courts to be competing moneyed capital within the meaning of Section 5219 of the Revised Statutes. The State of Alabama had a right to make classifications and exempt property thus classified. The Supreme Court of Alabama has held that such classifications are reasonable and that in making such classifications the Legislature did not violate the equality clause of the State Constitution. It is submitted that under the numerous cases heretofore cited and others which we have not adverted to, these classifications are reasonable under the Fourteenth Amendment of the Federal Constitution. Therefore in taxing the shares of state banks and failing to tax mortgages, mortgage loan companies, and building and loan associations, the State did not violate either its own Constitution nor did it violate the equal protection clause of the Fourteenth Amendment. Classification is a legislative prerogative. It cannot be said that such classifications are unreasonable. The Supreme Court of Alabama has held that they were not. Therefore so far as the exemption of these species of property from ad valorem taxation, the Petitioner cannot complain.

The next and chief question is whether the failure to tax national banks because of the failure to tax "other competing moneyed capital" within the meaning of Section 5219 of the Revised Statutes of the United States constitutes a violation of Petitioner's right of equal protection within the meaning of the Fourteenth Amendment.

SECTION 6, ACTS 1923, PAGE 152, IS AN ARRANGEMENT FOR VALUATION AND ASSESSMENT AND IS NOT A CLASSIFICATION FOR TAXATION.

There are two contentions made by Petitioner with respect to national bank shares. Namely that Section 6 of the Revenue Act of 1923, is a classification for tax purposes, and second, that state and national banks are so one and the same species of property that any benefit received by one inures to the other.

Petitioner points out on page 24 of his brief various methods of valuing property for assessment.

Section 4, Acts 1923, page 152, provides that:

> "All *taxable property* within this state shall be assessed for the purpose of taxation at sixty per cent of its fair and reasonable market value."

Section 2B, Acts 1923, page 152, provides for the levy of taxes according to the rates fixed by the Constitution. This Section provides as follows:

> "There is hereby levied for the purpose and upon the property hereinafter named and not specifically exempted from taxation and the property named in all other revenue laws of this State not specifically repealed by this act annual taxes as follows, to-wit: a. For the maintenance of the public schools of this State, thirty cents on each one hundred dollars of

the assessed value of taxable property. b. For the relief of needy Confederate soldiers and sailors, resident citizens of Alabama, and their widows, ten cents on each one hundred dollars of the assessed value of taxable property. c. For the use of the State and to raise revenue therefor, twenty-five cents on each one hundred dollars of the assessed value of taxable property."

Section 214 of the Constitution of Alabama, 1901, provides that:

> "The Legislature shall not have the power to levy in any one year a greater rate of taxation than sixty-five one-hundredths of one per centum on the value of the taxable property within this state."

In the case of State v. Birmingham Southern Railway Company, 182 Ala. 475, this Section and the kindred Sections 211 and 217 were construed in this manner:

> "It is perfectly clear that there is nothing expressed or implied in the language of this limitation which prohibits the Legislature from fixing as a basis for taxes any percentage of the actual value of the property whether greater or less than one hundred per cent thereof, provided only that such rule is applied without discrimination to all property of the same nature."

In obedience to the mandates of the Constitution, the Legislature has provided different methods of ascertaining sixty per cent of the fair and reasonable market value of different kinds of property. Real and tangible personal property are valued by the County Tax Assessor and finally fixed by the County Board of Review. Public utilities are valued by the State Tax Commission. Shares

of general corporations are finally valued by the State Tax Commission. Shares of banks are valued by the State Tax Commission subject to a final valuation by the County Boards of Review. Any assessment made by the local authorities may be set aside and revalued by the State Tax Commission within the current year. The purpose of all these methods, however, is identical, namely to determine what is the fair and reasonable market value of the property.

We respectfully submit, therefore, that the grouping of State and National Banks as is done in Section 6 of the 1923 Revenue Act is not to be termed and is not a classification for purposes of taxation. The sole purpose of this Section, we submit, is to determine the fair and reasonable market value of the shares for purposes of taxation, and to make the bank the agent of the shareholders for the payment of the taxes. While this is argued most strongly to constitute a classification, it is submitted that this is nothing more nor less than providing that a different body may determine the fair and reasonable market value of the property for purposes of taxation, than the body which values real and tangible personal property. If the various boards are able to value the properties placed in their jurisdiction in accordance with the mandate of the law, there can be no discrimination or difference between any kind or species of taxable property within the State of Alabama.

We respectfully submit that to hold this to be a classification for taxation purposes would constitute the taxing of property at different rates, and hence be violative of the uniformity provisions of the State Constitution. All property must be taxed at the same rate. All property must be valued at a certain percentage of its fair and reasonable market value, which is at present sixty per

cent. Beyond this the Legislature or the taxing authorities cannot go in making classifications.

We therefore submit that the arrangement in Section 6 of the Revenue Act of 1923, is nothing more than an effort on the part of the Legislature to fix a practical method by which the taxing authorities can be governed in finding out what is the fair and reasonable market value of the shares.

THE FAILURE TO LEVY A VALID TAX AGAINST THE SHARES OF NATIONAL BANKS DOES NOT INVALIDATE THE TAXATION OF THE SHARES OF A STATE BANK.

As we conceive it the principal question before this Court is whether a State must limit its taxation of its own subjects to that levied against similar property of an instrumentality of the United States, and whether the states in exercising their jurisdiction over their own subjects are required by the Fourteenth Amendment to so tax them that such taxes will conform to the authority and power which it has over Federal instrumentalities.

Thus presented the question is of far reaching importance and one which transcends the mere question of Petitioner's asserted inequitable treatment under the condition existing in Alabama at the time of the inception of this suit. As we conceive it, it involves a new interpretation of the Fourteenth Amendment and an extension of its sphere into a new and hitherto uncharted sea. The sovereignty reserved to the states is challenged, not because of a discrimination between its own subjects, but because of a discrimination existing between it and instrumentalities of the Government of the United States over which the State has no power or control except such as may be accorded it by the Federal Congress.

The question here presented is, we respectfully submit, one involving the inherent powers of the State. The decision here to be made determining to a great extent as it will the effect of the Fourteenth Amendment on the inherent powers of the State, will, as we conceive it, decide not merely whether the Union Bank and Trust Company should be refunded some $2500.00, but will affect to a great extent the sovereignty of the State. It is a question not to be determined on the abstract question of the justice or injustice done to this particular Petitioner, but must be decided on the fundamental principle involved. We submit that it is a far reaching principle to declare that because the Federal Government forbids or the State of Alabama is without authority to tax an instrumentality of the government, then the State is without authority to tax its own legitimate subjects whose business is of a nature similar to that conducted by the Federal instrumentality.

We take these propositions to be so oft and clearly decided as to have become axiomatic. That the power of the State over all subjects not granted to the Federal Government to be inherent. That wherever a power has been delegated to the Federal Government, the State is without authority except as it may be authorized by the Federal Congress. That the national government has the right and power to organize and create national banks in the promotion of its fiscal policies. That the Government may not tax the instrumentalities of the State. That the states may not tax the instrumentalities of the Government. That therefore the national bank being an agency and instrumentality of the Government, the State is without power to tax it in any manner whatsoever except as may be granted by the Federal Congress.

This Court has thus laid down the rule:

"Congress may prohibit any taxation of national banks by states, cities, counties, or towns, and its mere silence on the subject if it were silent would be a prohibition."

First National Bank vs. Richmond, 13 Supreme Court Reporter, 1044, 149 U. S. 769, dismissing appeal 39 Fed. 309.

"The respective states would be wholly without power to levy any tax either direct or indirect upon the national banks, and property assets, or franchises were it not for the permissive legislation of Congress."

Citizens Savings Bank vs. Owensboro, 173 U. S. 636, 19 Supreme Court Reporter 530, 43 L. Ed. 840.

Therefore a national bank is not a subject over which the State has the power of taxation either inherent or otherwise except at the caprice of Congress.

Congress has permitted or granted to the States the right to tax the shares of national banks in limited manner. The State of Alabama in attempting to tax the shares did not meet the limitations and restrictions placed on this power by the Federal Congress. The effect, therefore, is to exempt the shares of national banks. As was stated in the majority opinion of the Supreme Court of Alabama, the rule is that the states in exercising this delegated power must exercise it in accordance with the restrictions placed thereon by Congress else the effort to exercise this power is abortive and void.

The effect of the failure of the State of Alabama to effectively tax the shares of the national banks doing business in Montgomery and competing with Petitioner renders the shares of such national banks wholly and com-

pletely exempt from State taxation. The states have hitherto been entirely without power to tax the personal property of national banks. Therefore with respect to shares, the Petitioner is now in the identical situation as has hitherto existed with respect to personal property. Personal property of national banks is not taxed because Congress has not authorized it. Personal property of state banks is taxed. Shares of national banks competing with Petitioner are not taxed because the State has not complied with the conditions imposed by Congress. Shares of state banks including this Petitioner are taxed under the decision of the Supreme Court of Alabama.

The Petitioner asserts that the failure to meet the restrictions imposed on the power of the State to tax national banks voids its power to tax the shares of state banks.

We respectfully submit that if this rule be sound then the taxation of the personal property of Petitioner is and has continuously been a violation of its equal rights, because similar property belonging to competitive national banks was entirely exempt from taxation. Perhaps this rule would extend to any corporation which may do a competitive business.

This brings us back to the fundamental question involved: Does the Fourteenth Amendment require the state to tax property similar to that owned by Federal instrumentalities in accordance with the power which it may have granted to it to tax such instrumentalities?

The Government of the United States is a government of delegated powers,—in the exercise of which powers it is supreme, and the states are without any power whatsoever to hinder, delay, or obstruct the operation of the Government either when operating directly or through its legal instrumentalities.

Chief Justice Marshall in McCulloch vs. Maryland, 4 Wheat. 316, thus laid down the rule which we conceive to be applicable in the present case:

"The government of the Union, though limited in its powers, is supreme within its sphere of action; and its laws, when made in pursuance of the constitution, form the supreme law of the land.

"There is nothing in the Constitution of the United States, similar to the articles of Confederation, which exclude incidental or implied powers.

"If the end be legitimate, and within the scope of the constitution, all the means which are appropriate, which are plainly adapted to that end, and which are not prohibited, may constitutionally be employed to carry it into effect.

"The power of establishing a corporation is not a distinct sovereign power or end of government, but only the means of carrying into effect other powers which are sovereign. Whenever it becomes an appropriate means of exercising any of the powers given by the constitution to the government of the Union, it may be exercised by that government.

"If a certain means to carry into effect any of the powers, expressly given by the constitution to the government of the Union, be an appropriate measure, not prohibited by the constitution, the degree of its necessity is a question of legislative discretion, not of judicial cognizance."

"All subjects over which the sovereign power of a State extends, are objects of taxation; but those over which it does not extend, are, upon the soundest principles, exempt from taxation. This proposition may almost be pronounced self evident.

"The sovereignty of a State extends to everything which exists by its own authority, or is introduced by its permission; but does it extend to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States? We think it demonstrable that it does not."

It will be observed, therefore, that the Supreme Court of the United States in this ruling declared that the Bank of the United States, a private corporation, organized under authority of an Act of Congress, the stock of which was owned by private individuals, was an instrumentality or agency of the United States, and that the taxing power of the states does not extend to such agency.

About ten years later, the Supreme Court of the United States decided the case of Weston v. City Council of Charleston, 2 Pet. 449, a case involving an attempt on the part of the City of Charleston to tax bonds of the United States. The opinion of the Court in this case was likewise rendered by Chief Justice Marshall and in denying the power of the City of Charleston to levy such a tax, he said:

"A contract made by the government, in the exercise of its power, to borrow money on the credit of the United States, is undoubtedly independent of the will of any State in which the individual who lends may reside, and is undoubtedly an operation essential to the important objects for which the government was created. It ought therefore on the principle settled in the case of McCulloch v. The State of Maryland, to be exempt from state taxation, and consequently from being taxed by corporations deriving their power from states. * * *

"The right to tax the contract to any extent, when made, must operate upon the power to borrow before it is exercised, and have a sensible influence on the contract. The extent of this influence depends on the will of a distinct government. To any extent, however inconsiderable, it is a burden on the operations of the government. It may be carried to an extent which shall arrest them entirely. * * * The tax on government stock is thought by this court to be a tax on the contract, a tax on the power to borrow money on the credit of the United States, and consequently to be repugnant to the Constitution."

These decisions demonstrate that at a very early date it was established beyond question that no instrumentality of government or governmental operation of the United States, was subject to the taxing power of the states. From that time down to the present date, there is a long line of authorities following these two early decisions of Chief Justice Marshall. All sorts of federal agencies and governmental operations have been involved in these decisions, such as national banks and similar federal agencies.

In comparatively recent times, the Supreme Court has had occasion to consider whether this exemption of Federal agencies from taxation extended to the municipalities of a Territory of the United States, and in the case of Farmers Bank vs. Minnesota, 232 U. S. 616, it was held that territories and their municipalities and governmental operations, including bonds issued by them, may not be taxed by the State.

In recent times the United States has very frequently created governmental agencies in the form of private corporations, a typical example of which is the system of Federal Land Banks which has been established under the

Act of Congress. The farm loan bonds issued by these banks were held not subject to State taxation.

Smith vs. Kansas City Title Company, 255 U. S. 180.

Even mortgages payable to such Banks have been held exempt from the same priviiege recording tax, complaint of which is made in this suit.

Federal Land Bank vs. Crosland, 261 U. S. 374.

The property of the United States Shipping Board Emergency Fleet Corporation has been held to be immune from State taxation even though the Corporation is a private corporation.

King vs. United States Shipping Board Emergency Fleet Corporation, 282 Fed. 950;

The property of the United States Spruce Corporation was held exempt from State taxation.

Clallam County vs. United States, 263 U. S. 341;
Erickson vs. United States, and United States Spruce Corporation, 264 U. S. 246;

The property owned by the United States Housing Corporation was held exempt from State taxation.

City of New Brunswick vs. United States, 276 U. S. 547.

There are innumerable cases in which the United States has employed corporations and individuals as its agents to carry out some governmental purpose. The Courts

have uniformly held that such individuals and corporations, in the exercise of the governmental functions entrusted to them by the Federal Government were exempt from taxation by the states. See for instance;

Jaybird Mining Co. v. Weir, 217 U. S. 609;
Gillespie v. State of Oklahoma, 257 U. S. 501;
Missouri K. & T. Ry. Co. v. Meyer, 204 Fed. 140.

The extent to which the policy of the Government has been followed in creating private corporations to carry on certain activities was thus indicated in Skinner & Eddy Corp. vs. McCarl, 275 U. S. 1:

"Government-owned private corporations were employed by the United States as its instrumentalities in several other fields during the World War. The Food Administration Grain Corporation (later called the United States Grain Corporation) was organized under the laws of Delaware under the Food Control Act, August 10, 1917, C. 53, Sec. 19, 40 Stat. 276. See Acts of March 4, 1919, c. 125, 40 Stat. 1348, and Executive Orders, August 14, 1917, March 4, 1919. The United States Spruce Corporation was organized by the Director of Air Craft Production under the laws of the District of Columbia, pursuant to the Act of July 9, 1918, c. 143, 40 Stat. 845, 888-889, for the purpose of aiding the production of aircraft material. The United States Housing Corporation was organized under the laws of the District of Columbia by authority of the President, for the purpose of providing housing for war needs under the Act of June 4, 1918, c. 92, 40 Stat. 594, 595. The War Finance Corporation was organized under the Act of April 5, 1918, c. 45, 40 Stat. 506, to assist financially, industries important to the successful prosecution of the War. For many years before the War, the Government had employed the Panama Railroad Company as its instrumentality in connec-

tion with the Canal. And, since the War, the Inland Waterways Corporation has been organized by the Secretary of War to operate the Government-owned inland waterways system pursuant to the Act of June 3, 1924, c. 243, 43 Stat. 360. The Government likewise has established, and holds all the stock in the Federal Intermediate Credit Banks, formed under the Act of March 4, 1923, c. 252, Sec. 205, 42 Stat. 1454, 1457, to bring about easier agricultural credits."

Attention is called to the recent Act creating the Reconstruction Finance Corporation and similar emergency relief agencies.

This principle of immunity as applied to national banks has thus been stated:

> "The respective states would be wholly without power to levy any tax either direct or indirect upon the national banks and property assets or franchises were it not for the permissive legislation of Congress."
>
> Citizens Savings Bank vs. Owensboro, supra.

Therefore a national bank is such an arm of the Government of the United States as to enjoy the immunity of the Government. While all power over such instrumentalities is vested in the Federal Government, Congress may grant or delegate to the states certain powers including that of taxation, but when it does so the states are limited in their exercise of the power to the terms and restrictions placed upon its exercise by the Federal Congress.

Is a Federal instrumentality of such nature that subjects of a State can invoke the Fourteenth Amendment for their own protection because the State fails through

lack of power to accord the same treatment to a Federal instrumentality?

We submit that if this rule is sound it should be applied without limit and without exception.

The Government of the United States through its various agencies engages in many and various forms of business. The national bank itself, according to the record of the cases heretofore before the Court has numerous powers by charter and almost unlimited "incidental" powers. So great has been the expansion of Federal activities during recent years that there are comparatively few lines of business on which a Federal instrumentality does not impinge and with which it does not compete. For this Court to declare that the power of the State over its own citizens is to be limited under the Fourteenth Amendment to the power it may have over a Federal instrumentality is, we submit, revolutionary in its nature and beyond the meaning and purpose of the Fourteenth Amendment.

Petitioner argues with great force that the State has specially classified state and national banks. We respectfully ask, is such a classification possible? The state bank receives its life from the Legislature of Alabama. The laws regulating it are such as the Legislature may see fit to impose. It is under the supervision of the State Banking Department created by law. Its powers may or may not be different from those of national banks. State banks are private corporations. They are not agencies of the State of Alabama. They are subjects of the State of Alabama, created under general law.

The national bank is organized under the authority of Congress. Its powers and regulations are fixed by Congress. Its supervision is by the United States Treasury.

It has been repeatedly declared to be a Federal instrumentality.

The State can in regulating state banks lay down any rules which it sees fit, and the fact that Congress has laid down different rules relative to national banks cannot affect or alter the validity of the rule laid down for the state banks. The power of the Legislature to create them, to regulate them or to abolish them is, we conceive, without question.

On the other hand no action of the Legislature of Alabama can affect national banks. They would continue to live if the states abolished the state banks. The State cannot regulate or determine their manner of operation. Even criminal offenses committed by its officers are, generally speaking, triable in Federal Courts. Only in the matter of taxation has Congress seen fit to grant certain powers to the states with reference to national banks. It is now asserted that Congress having seen fit to grant a restrictive power of taxation as to the shares of national banks, the State must tax the shares of state banks accordingly. We submit that if this position is logical, the state bank could invoke the Fourteenth Amendment if the regulations imposed by state law were more stringent than those imposed by Congress on national banks. If this conclusion be possible, then the power of the states over the banking corporations created by the authority of their laws is innocuous and wholly subject to the behest of the Federal Congress.

Is and can the situation be any different in the matter of taxation? The State of Alabama has an inherent power to tax all property within its jurisdiction. It has no power to tax property without its jurisdiction. Federal instrumentalities are without its jurisdiction. The Fourteenth Amendment guarantees to the citizens equal pro-

tection of law. To now declare that the State must tax its own subjects according to the manner in which it taxes a Federal instrumentality is a novel principle. Carried out logically it appears to Respondent that these conclusions inevitably follow: (1) That if Congress permits the State to tax all the property of Federal instrumentalities at the full rate and the full valuation provided by law, then the State can likewise tax its own subjects in the same manner and to the same extent. (2) If Congress should declare that the states can tax Federal instrumentalities upon a valuation of only fifty per cent, then the states would be limited to a fifty per cent valuation in applying the law to their own subjects. (3) If Congress permits the taxation of real estate of Federal instrumentalities and is otherwise silent the states are limited to the taxation of real estate of their own subjects. Logic would seem to demand if no power is granted, all similarly classed should be exempt.

The force and effect of Petitioner's brief is that if Congress does authorize any taxation of a Federal instrumentality then the states must exercise the power but can exercise it only in the manner limited by Congress, and must apply the same rule to all other property similarly situated.

It is asserted with confidence that the Fourteenth Amendment requires this. Is this Court prepared to say to the State of Alabama and to the forty-seven other states of the Union, that the Federal Government may create national banks, farm land banks, intermediate credit banks, housing corporations, fleet corporations, spruce corporations, and engage in numerous other businesses or quasi business enterprises, invest them with governmental immunity and declare to the states that they must legislate in regard to their own subjects in the man-

ner which the Government permits them to legislate as to its own instrumentalities?

Surely in fact and in law, there is no difference between refusing entirely to exercise a power and in attempting to exercise it and failing. The discrimination, if there is a discrimination, exists the same in one case as it does in the other. The only difference is that the State attempted to correct it and failed.

We believe that under the authorities above cited and quoted, we have demonstrated that if there were no national banks the State has, in granting the exemptions complained of, violated no provision of the Fourteenth Amendment. The Supreme Court of Alabama has upheld them with reference to the uniformity provision of the State Constitution. While national banks are in a sense in the same class with state banks, both conducting in a general way the same sort of business, yet we confidently assert that a Federal instrumentality ipso facto cannot legally speaking ever be in the same class as a private corporation organized under the general laws of a State. If this be true, then the argument as to classification falls. Even though this Court should be of the opinion that they are of a similar nature, yet we must submit and insist that the protection of the Fourteenth Amendment cannot be measured by and based on the power of the states over Federal agencies. Otherwise any legislation whatsoever that the states enact regulating or taxing their own subjects is subject to the ever recurrent question: Is a Federal agency similarly situated treated accordingly? Such construction places the states under the control, caprice, and behest of the National Congress. the Tenth Amendment is abrogated in favor of the Fourteenth.

The Supreme Court of Alabama decided that Sections 211 and 217 of the Constitution "were limitations on the inherent power of the state and not on the power to tax delegated by the Federal Statute."

> "But where as in the case at bar, the attempted exercise of the delegated power of taxation under the Federal statute is abortive, there is no basis for applying the limitations embodied in Section 217 of the Constitution to taxes levied in the exercise of the states' inherent power on domestic bank stock."

It is submitted that the reasoning of the majority as to Section 217 of the State Constitution applies with equal force to the Fourteenth Amendment. The right of the Legislature to classify and exempt has been, as pointed out, similarly construed under this Section of the State Constitution and under the Fourteenth Amendment. The highest Court of the State has decided that the guarantee of Section 217 applies only to those things over which the State has inherent power. We submit as was concluded by the Supreme Court of Alabama that the guarantees of the Fourteenth Amendment should be likewise construed and that it does not require the taxation of property of the citizens of a State according to the power which it may be granted, or may choose to exercise over Federal instrumentalities.

Prior to Central State Bank vs. Bennett, 284 U. S. 239, no decision of this Court, so far as we have been able to discover had applied the Fourteenth Amendment to facts such as in this case. Nor, we respectfully submit, is the decision in that case conclusive. The basis of the Court's finding that the Fourteenth Amendment had been violated was the taxation of other moneyed capital, which had been specially classed by statute with state and national

bank shares, at a different rate. The situation is not the same here. Alabama differently classifies this moneyed capital and exempts it entirely. We have demonstrated, we believe, under the cases quoted these exemptions were constitutional. If this be true, the failure to tax national bank shares is the sole question here presented, and this is not foreclosed by the Bennett case.

The various cases construing the Fourteenth Amendment refer to property within the "jurisdiction" of the States. Surely jurisdiction, as thus used is not merely territorial. Clearly it means property over which the State may extend its laws.

If it means this, the Fourteenth Amendments does not apply to property belonging directly to the Government of the United States.

If it means this, it does not mean property of Federal instrumentalities which the states have been granted no right to tax at all.

Does it apply to Federal instrumentalities over which the State has a limited power?

If the latter applies does it apply without limit or degree?

We respectfully submit the rule to be logical must be universal.

Can this Court say that the Fourteenth Amendment guarantees to the citizens and corporations of Alabama the following:

Equal treatment with like property of the Government of the United States located within the State.

The answer is obviously in the negative.

Equal treatment with like property of Federal instrumentalities over which the State has been granted no power.

The answer according to Petitioner is still in the negative.

Equal treatment with like property of Federal instrumentalities, over which the State has been granted certain limited powers.

Petitioner says if any power is given it must be applied equally to all persons in the same class.

In other words, if Congress permits taxation at one per cent or at a valuation of ten per cent, the rate or valuation for all property similarly classed must be lowered to conform to the Fourteenth Amendment.

We submit the difference between an immunity absolute and partial, is one of degree, not of kind.

CONCLUSION.

It is submitted that the protective guarantees of the Fourteenth Amendment apply only to property which is in the jurisdiction of the states, in both a legal and a territorial sense, and were not intended to require the states to extend the same treatment to their own subjects accorded to the United States, or its instrumentalities.

Respectfully submitted,

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Attorneys for Respondent.

SUPREME COURT OF THE UNITED STATES.

No. 346.—October Term, 1932.

Union Bank & Trust Company, Petitioner, *vs.* R. C. Phelps, Individually and as Tax Collector of Montgomery County, Alabama.	On Writ of Certiorari to the Supreme Court of the State of Alabama.

[February 6, 1933.]

Mr. Justice McReynolds delivered the opinion of the Court.

Union Bank & Trust Company, the petitioner, organized under the laws of Alabama and located in Montgomery County, receives deposits and carries on a general commercial and savings bank business. It sued respondent in a State court to recover $2521.69, alleged to have been illegally exacted as taxes assessed for the year ending September 30, 1931. The assessment followed Section 6, Revenue Act of Alabama, 1923 (General Acts, 1923, 152), which directs—"Every share of any incorporated bank or banking association incorporated under the laws of this State, or any other state, or of the United States, shall be assessed for taxation in the county, and in the city or town where such bank is located at sixty per cent of its fair and reasonable market value."

During 1930, 1931 and 1932 there were building and loan associations, industrial loan companies and corporations, and industrial banks in Montgomery County which loaned money in substantial competition with petitioner to the extent of hundreds of thousands of dollars the shares and the capital of which were exempted from ad valorem taxes. Also, there were mortgage companies and corporations and individuals, persons, firms and associations engaged in like business and employing moneyed capital to the extent of many thousands of dollars in substantial competition with petitioner, which were either untaxed or definitely exempted.

The Federal court had ruled that shares of National Banks in Alabama could not be subjected to taxation under Section 6, Act

of 1923, since the tax was not laid in conformity with Section 5219, U. S. Rev. Stats., as amended by the Acts of March 4, 1923, c. 267, 42 Stat. 1499, and March 25, 1926, c. 88, 44 Stat. 223, which only permits taxation of shares of national banking associations at a rate no greater than the one required of other moneyed capital in the hands of individual citizens coming into competition with the business of such associations. The State officers had accepted these decisions as correct declarations of the law.

Petitioner based its claim to recover upon the theory that the tax assessed against its shares had been exacted in violation of the equal protection clause of the XIV Amendment; also in violation of Secs. 211 and 217, Constitution of Alabama, which provide that all taxes shall be assessed in exact proportion to value and the property of private corporations, associations, and individuals shall be taxed at the same rate.

The trial court gave judgment for petitioner. The Supreme Court reversed this action and denied any recovery, holding that the legislature had not exceeded its powers in making classifications and exemptions; and, specifically, that there was no violation of the Federal Constitution.

Only the federal question is before us. Was the petitioner denied equal protection of the laws?

Because of existence within the State of untaxed moneyed capital and shares of corporations in actual competition with National Banks, the shares of the latter during the years in question were not subject to ad valorem taxation under Section 6, Revenue Act of 1923, or otherwise. And the State Supreme Court so held.

We cannot say that the State Legislature exceeded its power to make reasonable classification when it directed that moneyed capital or the property and shares of building and loan associations, industrial loan corporations, industrial banks, mortgage companies, etc., should be exempt from ad valorem taxation or taxed on a different basis from the one prescribed for banks accepting deposits and doing a general commercial business notwithstanding actual competition between them.

Mere competition between them is not enough to show two concerns must be burdened alike. The State Legislature reasonably might have determined that there was fair ground for distinction; and upon the record we may not hold that its action was arbitrary, capricious or wholly unreasonable.

There was sharp disagreement in the court below, but none of the judges suggested disapproval of the view just stated. The minority did not discuss the federal question, but found violation of the uniformity clause of the State Constitution.

The doctrine applicable here was recently expounded in *Ohio Oil Co.* v. *Conway*, 281 U. S. 146, 159, and need not be restated.

Counsel for petitioner stoutly maintain: Shares of State and National banks belong to the same species of property. Not only are they essentially similar, but for many years the Revenue Statutes of Alabama have put them in the same category. Under the scheme of taxation presently existing in the State, National bank shares escape assessment while shares of State banks are subject thereto. Consequently, the latter are deprived of the equal protection of the laws guaranteed by the XIV Amendment.

A sufficient answer is that within the intendment of the XIV Amendment shares of National and State banks are not essentially the same when considered in connection with taxation. Nor do they become so merely because the State has attempted to subject them to like treatment.

The several States lack power to tax National bank shares except as expressly permitted by Congress. *Owensboro National Bank* v. *Owensboro*, 173 U. S. 664, 668; *Des Moines National Bank* v. *Fairweather*, 263 U. S. 103, 106; *First National Bank* v. *Anderson*, 269 U. S. 341, 347. This is enough to negative the idea that shares of National and State banks are essentially the same for purposes of taxation. And the Alabama Supreme Court has held that under her Constitution, although the legislature may have included them in the same class of taxable objects, there is permissible distinction between them.

To accept the doctrine that as the States can only tax a Federal instrumentality when permitted by Congress, therefore they can not tax competitors of such instrumentalities within their general jurisdiction in some other fashion without violating the XIV Amendment would be both illogical and destructive of their proper independence.

Such instrumentalities are exempted from State taxation without the express consent of Congress, by the Federal Constitution. They are of a class wholly distinct from the property of ordinary corporations or individuals and this fact cannot be disregarded by the State. If the State sees fit to tax unrestricted property

within her jurisdiction and to omit National Bank shares, the classification cannot be said to be arbitrary and wholly unreasonable—the basis of it is plain enough. It may be vastly more important for the State to omit National Bank shares and tax ordinary moneyed capital according to a plan not permissible in respect of National Bank shares rather than conform to the standard prescribed by Congress. There is nothing to indicate that Congress ever supposed that mere establishment of a National Bank within a State could upset the scheme for taxation, theretofore entirely proper, by producing conflict with the XIV Amendment. This view would subject the taxing power of the State to the will of Congress far beyond what is necessary for the protection of federal agencies. The constitutional inhibition against taxing these agencies does not abridge the taxing power of the several States in respect of other property. The implied exemption is a shield for federal agencies—not the source of congressional power to control State action in respect of other matters.

Iowa-Des Moines National Bank v. *Bennett,* 284 U. S. 239, much relied upon by petitioner, is not controlling—the circumstances and issues there involved were wholly different from those here presented. The Iowa Supreme Court found, or assumed, and this was accepted here, that through the wrongful action of State taxing officials the complaining banks had been subjected to intentional, arbitrary and systematic discrimination through assessments greatly in excess of those imposed upon competing moneyed capital; and the unequal exaction complained of were in violation of the Iowa laws. The points for decision in this Court concerned the effect of unauthorized action by State officers (Could such action be attributed to the State?) and the proper remedy. Unlawful inequality of treatment as between the banks and competing capital was not controverted. There was no occasion to consider whether failure by a State to tax National banks while subjecting her own banks to taxation would occasion discrimination against the latter forbidden by the XIV Amendment.

The judgment of the court below is

Affirmed.